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## STRAHAN'S LEADING CASES ON EQUITY

BY

J. A. STRAHAN, M.A., LL.B.,

*Of the Middle Temple, Barrister-at-Law.*

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*The method adopted in this work is to illustrate the doctrines of Modern Equity by the means of Leading Cases. The plan of Leading Cases has been selected as being best calculated to interest the reader and impress the modern doctrines on the minds of both Students and Practitioners.*

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A

# DIGEST OF EQUITY.

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## THIRD EDITION.

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LONDON:

BUTTERWORTH & CO., BELL YARD, TEMPLE BAR.  
Law Publishers.

WINNIPEG : BUTTERWORTH & Co. (Canada), Ltd. | SYDNEY : BUTTERWORTH & Co. (Australia), Ltd.

CALCUTTA :  
BUTTERWORTH & Co. (India), Ltd.

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LONDON :

PRINTED BY BUTTERWORTH AND CO., CRANE COURT, E.C.

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## PREFACE.

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OWING to the absence of Mr. KENRICK in India, this Edition has had to be prepared without the benefit of his assistance.

The substantial alterations are that Book I., dealing with the Jurisdiction of Chancery, has been recast and enlarged, and that to Book II. three new Articles have been added on Married Women's and Infants' Property. As regards the part from Mr. KENRICK's pen (Sections I. to V. of Book III.), Mr. STRAHAN, save for deleting two Articles which the enlargement of Book I. rendered superfluous and some of the authorities cited which seemed to him too numerous for a student's book, has done no more than bring it up to date.

Mr. STRAHAN has to thank many gentlemen for suggestions and criticisms, and especially his friend and former pupil, Mr. NORMAN OLDHAM, of the Inner Temple, Barrister-at-Law, who was also kind enough to read the proofs. Mr. CASTOR, also a former pupil, rendered great

assistance in searching up and noting many cases, and in seeing the Book through the press.

Mr. STRAHAN is again indebted to his clerk, Mr. T. E. LEWIS, for compiling the Tables of Cases and Statutes.

*April 23rd, 1913.*

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## PREFACE TO THE FIRST EDITION.

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**I**N order that the credit or discredit arising out of the authorship of this book may be properly allotted, a word should be said of its genesis.

Mr. STRAHAN, early in 1904, conceived the design of the Work. He had written Books I. and II., when considerations of health led him gratefully to accept Mr. KENRICK's offer of assistance. Mr. KENRICK, following Mr. STRAHAN's design, then wrote Sections 1 to 5 of Book III., while Mr. STRAHAN wrote Section 6 of that Book, prepared the Index, and saw the volume through the press.

The plan of the book is based on two considerations. The first is this: The Court of Chancery was concerned, as to matters within its exclusive jurisdiction, merely in applying and adapting to different circumstances the general doctrines of Trusts; and as to matters within its concurrent and auxiliary jurisdiction in enforcing legal rights by equitable remedies. Trusts and equitable remedies being, then, the foundation of the whole system of Equity, they have been treated at greater length than is usual in an elementary work, while other matters usually discussed in such a work, such as partnership, partition, married women's and infants' property, fraudulent conveyances, etc., have been considered only in so far as they are affected by

equitable doctrines. The second consideration is this : Equity being essentially a matter of principle, it seemed desirable to state it in the shape of a series of Articles, each setting out a general principle. The refinements, and, it must be added, the occasional obscurity of equitable doctrines, together with the multitude of matters with which they deal, made this a task of very great difficulty. The Authors hope their readers will not be too severe if they find the law not enunciated in a series of epigrams, or if they notice matters of more or less importance which have been overlooked.

Mr. STRAHAN has to thank his friend and pupil, Mr. A. F. FILOSE, of the Inner Temple, Barrister-at-Law, for very valuable help in preparing the Index, and in seeing the Work through the press. He has also to thank his clerk, Mr. T. E. LEWIS, for verifying some fifteen hundred References, and for assistance in compiling the Tables of Cases and Statutes.

*June 30, 1905.*

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## TABLE OF ABBREVIATIONS.

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Ash. Eq. ...	Principles of Equity, by Walter Ashburner (1902).
Stra. Conveyancing	A Concise Introduction to Conveyancing, by J. Andrew Strahan (1900).
Stra. L. C....	Leading Cases in Equity, by J. Andrew Strahan (1909).
Stra. Mortgages ...	The General Law of Mortgages, by J. Andrew Strahan (1909).
Stra. Property ...	A General View of the Law of Property, by J. Andrew Strahan (5th ed. 1908).
Stra. Wills ...	The Law of Wills, by J. Andrew Strahan (1908).
Stra. and Old. ...	Strahan and Oldham's Copyright Act. 1911.
Under. Trusts ...	A Concise Manual on the Law of Private Trusts and Trustees, by Arthur Underhill (7th ed. 1912).
Under. and Stra. Inter. of Wills.	The Principles of the Interpretation of Wills and Settlements, by Arthur Underhill and J. Andrew Strahan (2nd ed. 1906).



## BOOK I.

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### JURISDICTION OF CHANCERY.



# A DIGEST OF EQUITY.

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## BOOK I.

### JURISDICTION OF CHANCERY.

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ART. I.—“Equity” means the Rights and Remedies created by the former Court of Chancery.

THE former Court of Chancery created certain rights and remedies, recognised and enforced by it only, which were supplemental to and sometimes corrective of the legal rights and remedies recognised and enforced by Courts of Common Law. These were called “equitable” rights

and remedies, and together they constituted what was called "Equity."

Formerly, it was customary to classify the matters with which equity deals according as they came within the exclusive, concurrent, or auxiliary jurisdiction of the Court of Chancery. Matters came within its exclusive jurisdiction when it, and it only, was competent to hear and dispose of them ; within its concurrent jurisdiction when it and a Court of Law were equally competent to hear and dispose of them ; and within its auxiliary jurisdiction when a Court of Law only was competent to dispose of them, and the Court of Chancery was entitled to intervene merely to such extent as was necessary to enable a Court of Law to dispose of them effectively. Thus, for example, trusts were within the exclusive jurisdiction : a Court of Law, as such, had no authority to interfere in their interpretation or administration. Questions relating to ancient lights were within the concurrent jurisdiction : a Court of Law, equally with the Court of Chancery, had authority to deal with them. A contract for the supply of goods procurable in the open market was within the auxiliary jurisdiction : where such a contract was broken, all the Court of Chancery could do was to grant some assistance to the parties—such as discovery of documents—so as to enable them to put their case satisfactorily before the Court of Law which was trying the action for breach of the contract.

This difference in the extent of the court's jurisdiction was attended by a difference in the principles applied by it. In matters within its exclusive jurisdiction, the court, in settling the rights of the parties and in giving remedies proceeded on equitable principles. Thus, as we shall see, in the case of trusts all the principles applied were the creation of the court itself. In matters within its concurrent jurisdiction the court, in settling the rights of the parties, proceeded on legal principles, but, in giving remedies, proceeded on equitable principles. Thus in actions for the obstruction of ancient lights, the court, in deciding what amounted to an obstruction, applied the same principles as would a Court of Law, but

instead of giving a remedy in damages, which was all a Court of Law could give, it gave a remedy by forbidding the erection or by ordering the removal of the obstruction. In matters within its auxiliary jurisdiction, it did not, as we have seen, settle the rights of the parties at all, but merely gave an equitable remedy to assist a Court of Law to settle them.

To sum all this up, where the right to be enforced and the remedy sought were both equitable, the matter was within the exclusive jurisdiction ; where the right to be enforced was legal, but the remedy sought was equitable, it was within the concurrent jurisdiction ; where both the right to be enforced and the remedy sought were legal and equity only intervened to help the plaintiff to get the legal remedy, it was within the auxiliary jurisdiction.

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## ART. II.—*Assumptions on which the Authority of Equity was based.*

The authority of Equity was based on three assumptions :

- (1) That Equity was matter of grace since the court in granting it was exercising the King's prerogative to give, when he thought fit, relief to his people outside the ordinary powers of law.
- (2) That Equity was matter of conscience since the court, in exercising the prerogative in granting it, was acting as the King's conscience.
- (3) That Equity was enforceable by process of contempt since the court was a Court

of Record, and as such entitled to treat wilful disobedience to its order as a contempt of court, and therefore punishable by arrest and imprisonment until the party in contempt submitted.

#### PARAGRAPHS (1) AND (2).

The conceptions originally underlying English and Roman equity were in their essentials identical. Both systems were based on the notion that there is a justice which is higher than the justice of the law, and which must be observed in spite of the law. But the English system had one or two characteristics peculiar to itself.

In the first place, it owed its authority to the prerogative of the King. From the earliest times it was a royal prerogative, and at the same time a duty on the royal conscience, to see that the law was duly enforced, and to see that its enforcement caused no injustice. The chancellor, to whom, as keeper of the King's conscience, was delegated the performance of this duty, interfered almost as often to enforce a plaintiff's legal rights against a powerful defendant, as to prevent the oppression of a defendant through the plaintiff's harsh enforcement of legal rights. In the second place, English equity only interfered in individual cases of hardship. The constitution of England gave the King no authority to lay down general principles of justice differing from the law. All he was entitled to do was to prevent the law operating in specific cases where its operation would be oppressive. In the third place, equity interfered, not so much to prevent the person injured from suffering material damage, as to prevent the person inflicting the injury from doing himself spiritual injury. The primary notion was to keep persons from doing anything which would soil their conscience—a notion no doubt due to the fact that the earlier chancellors were all ecclesiastics, and therefore naturally adopted as their principle of action, not the legal principle of the prevention of wrongs, but the religious principle of the prevention of sin.

## PARAGRAPH (3).

There are two modes of enforcing a judgment. The first is by process of execution against the defendant's property. Here the court directs the proper officer to put the plaintiff in possession of the property in dispute or to seize so much of the defendant's goods as will be sufficient to satisfy the amount of damages awarded to the plaintiff. This is the mode which the common law has always favoured. The other is by process of contempt against the defendant's person. Here the court directs the defendant himself to transfer the property in dispute or to do whatever act or to pay whatever money the court has decreed, and on his failing to obey this order he is arrested and imprisoned (or, as the technical phrase is, "attached and committed") until he has "purged his contempt" by making submission to the court and obeying its order. When a court thus enforces its judgments it is said to act *in personam*, and so the proposition laid down in paragraph 3 (*supra*) is summed up shortly in the maxim that "Equity acts *in personam*."

Originally the latter was the only mode of enforcing a decree of the Court of Chancery. The defendant was directed by the court to purge his conscience by doing what was right, and if he did not obey the order of the court he was committed to prison for contempt. Gradually, however, the compulsion was extended beyond the defendant's person to his property. First fines were added to imprisonment, then the plaintiff was put into possession of the property in dispute, then followed sequestration of the property until the defendant purged his contempt (see Ash. Equity, pp. 40—43). But at no time did equity claim of its own strength to be able by its decree to decide or to transfer the legal ownership of property.

**ART. III.—Powers resulting from the Assumption  
that Equity is matter of Prerogative.**

The assumption that Equity is matter of grace enabled the court to refuse to grant an applicant the benefit of it whenever the court thought proper so to do.

A person seeking relief in a Court of Law was called a *plaintiff* in personal actions and a *demandant* in real actions; and in both cases he *claimed* the benefit to which he was by law entitled. All that the court had power to do was to decide if his claim was good by law. Once it decided that his claim was good at law, it was compelled to grant him relief according to law.

A person, on the other hand, seeking relief in a Court of Equity, was called a *suitor* or *petitioner*, and he *humbly prayed* the benefit of the court's grace. He was asking for something which the law did not allow him, and which the King alone could give him by the voluntary exercise of his prerogative entitling him when he thought proper to interfere and grant relief outside the law. This is shortly summed up in the maxim that "equitable relief always was within the discretion of the court," while legal relief was *ex debito justitia*.

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**ART. IV.—Powers resulting from the Assumption  
that Equity was matter of Conscience.**

The assumption that Equity was matter of conscience enabled the court :

- (1) To compel a party to restore to the injured party what in conscience the former could not keep, whether that

was more or less than the damage sustained by the injured party.

- (2) To restrain a party from an unconscionable act or omission, and not merely to order him to make compensation for it.
- (3) To take into consideration whether the person applying for equity had himself acted conscientiously in the matter.

#### PARAGRAPH (1).

The difference between the equitable and legal rules as to the reparation to be made by a person who had unlawfully interfered with the rights of another may be summed up thus : In equity the measure of such reparation was the extent of the benefit the wrongdoer received from, in law the extent of the damage he inflicted through, such interference (see *Lodge Holes Colliery Company, Limited v. Mayor, etc. of Wednesbury*, [1908] A. C. 323). Equity merely insisted that the wrongdoer should not retain any profit arising through his interference with the other's rights which it was contrary to conscience he should retain, and would not even consider whether or not that other suffered any material damage through such interference (*Parker v. McKenna* (1874), L. R. 10 Ch. 96; Stra. L. C., p. 6). Nor was it influenced by the motive which led to the interference : it had of its own strength neither punitive nor excusatory powers. Shortly, the equitable principle was restitution ; the common law principle, compensation.

#### PARAGRAPH (2).

At law the general rule is that no action lies until there is an actual wrongful act or omission ; where damage is necessary to make an act or omission wrongful, no action will lie until the damage ensues (*West Leigh Colliery Company v. Tunnicliffe and Hampson, Limited*, [1908] A. C. 27). But equity would interfere to prevent an unlawful act being done where such act, if completed, must

damage the plaintiff (see *Behrens v. Richards*, [1905] 2 Ch. 614). In the same way it would prevent a party from soiling his conscience by unlawfully refusing to do what he had promised to do. It was on these principles that the remedies by injunction and specific performance were based.

### PARAGRAPH (3).

This principle, together with the rule that equity is matter of prerogative, enabled the court to refuse relief altogether, or grant relief subject to conditions not on the legal or equitable merits of the plaintiff's claim but on the personal conduct of the plaintiff in the transaction who, as the maxim was, "did not come into court with clean hands." For instance, it would refuse to the owner of the copyright in a book relief against piracy where the book was immoral. Again, it would refuse relief to a plaintiff who himself refused to do equity, following the maxim that "he who seeks equity must do equity." For instance, if a husband sought to get possession of his wife's equitable property, the court would refuse him relief unless he himself dealt equitably by her, and made a proper settlement upon her. This was called a wife's *equity to a settlement*. Again, it would refuse relief to a plaintiff who, after knowledge of the facts, allowed a long time to elapse before seeking its assistance. He was said to be barred by his own *laches*, in accordance with the maxim that "delay defeats equity."

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## ART. V.—*Powers resulting from the Assumption that Equity was enforceable by process of Contempt.*

The assumption that Equity was enforceable by process of contempt enabled the court:

- (1) To forbid a party to assert his legal rights in a Court of Law;

- (2) To compel a party to use his legal rights for the benefit of another person ; and
- (3) To decide disputes arising between parties within its jurisdiction as to lands outside its jurisdiction, over which, in consequence, it could not directly exercise any control, provided such disputes were as to matters of which it, as a Court of Conscience, was bound to take cognizance.

#### PARAGRAPH (1).

Where a person brought an action in a Court of Law the defendant might possibly have a defence which, though a good defence in a Court of Equity, was of no avail in a Court of Law. Accordingly, if the action went to judgment, the Court of Law would be bound to decide for the plaintiff. To prevent this, the Court of Chancery, having no jurisdiction to prohibit the Court of Law from hearing, would, on the application of the defendant, restrain or *enjoin* the plaintiff from proceeding with the action. If he, after an order to this effect, proceeded with the action, the Court of Chancery attached him for contempt.

#### PARAGRAPH (2).

It is not too much to say that it was this power more than anything else which enabled the Court of Chancery to erect the whole structure of equity jurisprudence. As we have seen, the court never attempted by its decree to transfer the legal title to property. But by its power to compel the legal owner to use his legal rights over it as the court should direct, it was able in effect to deal with the property as it pleased, and so to create new interests having many of the incidents of legal interests but altogether unknown to the law.

## PARAGRAPH (3).

As has already been pointed out, when the title to land was in dispute, a Court of Law enforced its judgment by handing over the land to the person in whose favour it decided. Where the land was outside the jurisdiction of the court it was obviously impossible to do this. Accordingly, as the court could not in such cases execute its judgment, it refused to assume jurisdiction.

A Court of Equity, on the other hand, since it did not enforce its decrees by execution against the property, but by attachment of the person, was under no such disadvantage. Provided the person against whom the decree was sought was within jurisdiction, it did not matter where the property was. Accordingly, from an early time it claimed and exercised jurisdiction over foreign land, provided the dispute concerning such land was one in which it would have given equitable relief if the land had been in England (*Penn v. Lord Baltimore* (1750), 1 Ves. sen. 444).

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#### ART. VI.—*Evolution of Equitable Rights and Remedies by the Exercise of these Powers.*

Originally the Court of Chancery, in exercising these powers, followed no definite principles, but granted or refused relief in each particular case as seemed to it just. Gradually, however, the decisions of the court came to be based on its previous decisions, and in this way the circumstances under which equitable rights would arise or equitable remedies would be granted, and the nature and extent of equitable remedies, became fixed, although, until recent years, the court occasionally asserted its ancient jurisdiction to create new rights and remedies where justice seemed to demand this. Before its abolition,

however, it had ceased to do so, and professed only to apply old principles ; but in applying old principles in new circumstances the existence of rights and remedies, not heretofore recognised, had to be declared ; and, besides this, nominally the absolute discretion to grant or refuse equitable remedies still survived.

Equity was, as we have seen, matter of grace. Two results followed from this. No person was entitled to have it exercised in his favour, and in its exercise the chancellor had no power to lay down a general rule as to who should receive relief.

These two facts for a long time led men to regard it as in no sense constituting law or even principles of abstract justice. And it is evident that in giving relief the early chancellors each followed his own conscience and paid little or no attention to previous decisions on the same point. This is shown by the fact that it was not thought worth while reporting their decisions till 1557, while the reports of the decisions of the common law judges commenced in the reign of Edward the First. Gradually, however, it became more and more usual for one chancellor before deciding a case to consult the judgments of his predecessors on similar points. As decision followed decision, a principle was evolved applicable to every future case of a similar nature. These principles became so enlarged and refined by multitudes of applications that it was but rarely that circumstances arose to which none of them was applicable. When such circumstances did arise, however, then, as the case must be decided, the Court of Chancery, like the Courts of Law, had to invent new principles as analogous as possible to some of the old. These new principles form what is called judge-made law. (For an interesting account of the origin of equity the reader is referred to the opening pages of the late Professor Maitland's *Equity*.)

Perhaps the last instance of a new equitable principle being avowedly invented was in the year 1848,

when restrictive covenants were first held binding on successors in title with notice. An example of a new remedy arising owing to old principles being applied in new circumstances occurred very recently in the case of *Ideal Bedding Company v. Holland*, [1907] 2 Ch. 157.

Practically the same development took place in regard to the issue of equitable remedies, which were no longer arbitrarily granted or refused by the chancellor. The grounds upon which they might be granted or refused were settled by previous decisions, though, owing to the nature of these grounds, the principles regulating them were not so definite as those regulating equitable rights.

#### ART. VII.—*Fusion of the Jurisdictions of the Court of Chancery and the Courts of Common Law.*

The Court of Chancery and the Courts of Common Law have now been abolished, and the jurisdictions of both vested in the High Court of Justice. Now every judge of the High Court is bound to recognise equitable rights, and is entitled to grant equitable remedies; but the nature of equitable rights and the principles regulating the grant of equitable remedies are not thereby affected. Moreover a plaintiff seeking primarily to enforce an equitable right or to obtain an equitable remedy should bring his action on the Chancery side (called the Chancery Division) and not on the Common Law side (called the King's Bench Division) of the High Court. If he does

not, he is liable to have it transferred to the Chancery side.

The so-called fusion of law and equity brought about by the Judicature Act, 1873, is a fusion merely of jurisdictions, or, in other words, of the administration of the two systems. And even the fusion of the administration is only partial. By sect. 34 the following are assigned primarily to the Chancery Division : All causes and matters for any of the following purposes—

- The administration of the estates of deceased persons ;
- The dissolution of partnerships, or the taking of partnership or other accounts ;
- The redemption or foreclosure of mortgages ;
- The raising of portions, or of other charges on land ;
- The sale, and distribution of the proceeds, of property subject to any lien or charge ;
- The execution of trusts, charitable or private ;
- The rectification or setting aside or cancellation of deeds, or other written instruments ;
- The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases ;
- The partition or sale of real estate ; and
- The wardship of infants and the care of infants' estates.

Besides the matters here assigned to the Chancery Division others have been allotted to it by special Acts —for example, applications under the Vendor and Purchaser Act, 1874 (sect. 9) ; under the Conveyancing Act, 1881 (sect. 69) ; under the Settled Land Act, 1882 (sect. 46) ; all proceedings under the Trustee Act, 1893 (Order 54B, R. S. C.), etc.

The fusion of the administration of law and equity effected by the Judicature Act, 1873, has in no way altered the distinction between legal rights and remedies and equitable rights and remedies. It is true that sect. 25, after making special provisions as to several equitable doctrines, concludes (sub-sect. 11) by providing generally that whenever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity shall prevail. But this is simply a recognition of the fact that the rules of equity were, as we have seen, created as supplemental to and sometimes corrective of the common law, and did, before the Judicature Act, prevail over the common law. Though every judge of the High Court is now to administer both the common law and equity and to grant legal and equitable remedies in all matters coming before him, he administers common law and equity and he grants legal and equitable remedies in the same circumstances and subject to the same principles as applied to them respectively under the system recognised by the former Courts of Common Law and Court of Chancery.

Thus, under the old system, no equitable right was recognised in a Court of Common Law. Such rights were said, therefore, to be within the exclusive jurisdiction of equity. Not being recognised by the Courts of Common Law no legal remedy could, of course, be granted to enforce them. They were enforceable only by equitable remedies. Now a court of the King's Bench Division recognises an equitable right just as much as a court of the Chancery Division, but still no legal remedy can be granted by the one or the other to enforce them.

Thus, in *Lavery v. Pursell* (1888), 39 Ch. D. 508, the plaintiff had entered into a contract for the purchase of an interest in land. Such a contract should, by the Statute of Frauds (sect. 4), be in writing in order to be enforceable at law. Where, however, it is not in writing it becomes enforceable in equity if it is part performed. Here the contract was not in writing but was part performed by the plaintiff. The defendant

repudiated the contract. Now the remedy at law for a breach of contract is damages ; while the remedy in equity is specific performance. The plaintiff brought an action claiming specific performance or, in the alternative, damages. The court *held* that he would have been entitled to specific performance but that that had become impossible by the lapse of time. The court, however, could not award him damages as a court of law, since by law the agreement was incapable of legal enforcement owing to its not being evidenced in writing.

Again, in matters formerly coming within the concurrent jurisdiction—that is, where the right in question is a legal right, but the remedy sought is equitable—before an equitable remedy is given a breach at law of the legal right must still be proved to have taken place or to be threatened.

Thus, in *Colls v. Home and Colonial Stores, Limited*, [1909] A. C. 179 ; Stra. L. C., p. 1), the act of which the plaintiff complained was an interference with the lights of his house. The right to light is a legal right, but it is usually enforced by an equitable remedy—that is, by an injunction to restrain the defendant from interfering with the light. Now, at common law to constitute an actionable interference with the right, it must be shown that not merely has the defendant obstructed the light, but that he has obstructed it so gravely as to make the obstruction something in the nature of a nuisance. The Court of Appeal, forgetting that it was merely enforcing a legal right, held in this case that in equity any interference whatever with the right to light could be restrained, and granted the plaintiff an injunction, though the obstruction of his light was not such as would amount to an actionable wrong at common law. On appeal, *held* by the House of Lords, that where a matter was within the concurrent jurisdiction an equitable remedy could be granted only where a legal remedy would lie if the plaintiff had sought a legal remedy ; and as in this case the plaintiff could not have recovered damages, he could not obtain an injunction.

As regards the auxiliary jurisdiction, the practical effect of the Judicature Act is to abolish the necessity

in ordinary cases of recourse to it since every judge of the High Court can give any of the remedies which formerly could be obtained only in the Court of Chancery. "The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled, properly advanced by them, so as to avoid a multiplicity of legal proceedings" (*per Lord WATSON, Ind, Coope and Company v. Emmerson* (1887), 12 App. Cas. 300, at p. 308). At the same time, the old jurisdiction itself is not abolished. Thus, where it is desirable to do so, an injunction will be issued to restrain a party from instituting legal proceedings in another court at home or abroad (*Cercle Restaurant v. Laverty* (1881), 18 Ch. D. 555; *In re Connolly Brothers, Limited, Wood v. Connolly Brothers, Limited*, [1911] 1 Ch. 731).

Again, legal remedies can still be demanded as of right, while equitable remedies are still in the discretion of the court. A comparison of *Lodge v. National Union Investment Company, Limited*, [1907] 1 Ch. 300, and *Chapman v. Michaelson*, [1908] 2 Ch. 612, will make this clear.

Both of these cases arose under the Money-lenders Act, 1900. That Act makes contracts of loans void where the money-lender making the loan is not registered as such under the Act. In both cases the plaintiffs had borrowed money from the defendants who were not registered as money-lenders. In both cases the plaintiffs brought actions for declarations that the debts could not be recovered. Such declarations are legal relief. In *Chapman v. Michaelson, supra*, that was the only relief demanded, and the court held that it had no option but to grant it subject to no condition. In *Lodge v. National Union Investment Company, Limited, supra*, the plaintiff asked for further relief, namely, the delivery up by the defendant of certain bills of exchange which the plaintiff had deposited with him as security for the loan. This was equitable relief, and the court refused to order the return of these bills except on condition that the plaintiff repaid the money which he had received on loan from the defendant. The principle on which the court here pro-

eeded was the equitable maxim—"He who seeks equity must do equity."

Lastly, equity still acts *in personam*, though by virtue of various statutes not only may its judgment now be enforced by other means than process of contempt, but in certain cases it can by its order transfer the legal ownership of the property concerned in an action. Thus, by Order 42, R. S. C., a judgment directing the payment of money can, like ordinary legal judgments, be enforced by the writ of *fieri facias* or *elegit* (rules 3, 17); and a judgment for the recovery of land by writ of possession (*ibid.*, rule 5), and for the recovery of property other than land by a writ of delivery or of sequestration (*ibid.*, rule 6). And, as we shall see, the court has now large powers to make vesting orders which, without a conveyance, transfer the legal property from one person to another (see Art. XXXVI.). But still the ordinary mode of enforcing a judgment which formerly could be given only in the Court of Chancery, *i.e.*, orders especially requiring a party to an action to do any act other than the payment of money, or to abstain from doing anything, is still by attachment and committal (Order 42, rule 7, R. S. C.); and such a mode of enforcing an equitable judgment still enables the court to decide disputes relating to land outside its jurisdiction if the defendant is within it (see *Ewing v. Orr-Ewing* (1881), 10 App. Cas. 453; Stra. L. C., p. 11).

It will decide questions relating to land outside the jurisdiction of English law only where those questions would come within its jurisdiction as a Court of Conscience had they arisen at home. In the words of PARKER, J., in *Deschamps v. Miller*, [1908] 1 Ch. 856, at p. 863: "In my opinion the general rule is that the court will not adjudicate on questions relating to the title or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of

contract or implied contract, fiduciary relationship or fraud or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other unconscionable conduct as I have referred to, the court may very well assume jurisdiction" (see Stra. L. C., pp. 11—20).

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## **BOOK II.**

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### **EQUITABLE RIGHTS.**

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**DIFFERENCES BETWEEN EQUITABLE AND LEGAL  
INTERESTS.**

#### **DIVISION OF EQUITABLE RIGHTS INTO—**

- Division I.—Equities to Protect Confidences.**
- Division II.—Equities to Promote Fair Dealing.**
- Division III.—Equities to Prevent Oppression.**



## BOOK II.

### EQUITABLE RIGHTS.

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#### DIFFERENCES BETWEEN EQUITABLE AND LEGAL INTERESTS.

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#### ART. VIII.—*Equitable Interests in Property.*

(1) The chief subject-matter of equitable rights is property and transactions relating to property, and, by virtue of the power (referred to in Art. V.) of the Court of Chancery to compel a person to exercise his legal rights for the benefit of another person, equitable rights over property have been created by the court

in such a way as to bring into existence a system of equitable interests in property largely similar to the system of legal interests, but separate altogether from the legal ownership.

(2) Wherever an equitable interest in property is created, whether it was brought into existence by the court in order to protect confidence, promote fair dealing, or prevent oppression, there is in the view of the court a *trust* or *confidence* in the wider sense of that word created between the legal owner of the property and the person entitled to the equitable interest in it. The duties of the legal owner and the rights of the person entitled to the equitable interest vary greatly, however, according to the reason which led to the existence of that interest. "Trust" will therefore in this work be used only in the more specific sense set out in Art. XVII., except where the context otherwise indicates.

(3) Equitable interests in property, however they arise, differ from similar legal interests in the modes set out in Arts. IX. to XV., *infra*.

When the legal ownership and the equitable ownership of property are vested in different persons it is commonly said that the legal owner is trustee for the equitable owner (see *per* Lord LINDLEY in *Hardoon v. Belilios*, [1901] A. C. 118, at p. 123). But that does not necessarily imply that the relationship between them is based upon or arose out of any actual trust or confidence reposed by the one in the other. Where the relationship has so arisen, it is said to be an express trust, the term, used in this sense, including what are hereafter called presumptive trusts. Where it has arisen in any other way, it is said to be a constructive trust.

Thus a vendor until conveyance is a constructive trustee for the purchaser, and a mortgagee in possession is a constructive trustee for the mortgagor. The rights and duties of constructive trustees such as these differ much from those of express trustees, though equitable estates, however they arise, have, as we shall see, many characteristics in common.

While it is difficult to suggest any term other than "trust" to cover the relationship between any legal and equitable owner, we will endeavour to confine this term to what are called express trusts—that is, trusts in actions for breach of which the Statutes of Limitations could not, before the Trustee Act, 1888, be pleaded by the trustee—and constructive trusts arising more or less out of a fiduciary relationship.

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#### ART. IX.—*Equitable Interests affect the Conscience of the Legal Owner.*

(1) Legal interests in property are good in general against all the world, while equitable interests are good against those persons only who are in conscience bound to respect them.

(2) The legal owner and every person taking from him is bound in conscience to respect equitable interests in property except persons taking the legal ownership and giving value without having, at the time of giving such value, notice of the existence of the equitable interests, and persons taking from such persons, unless the persons so taking are themselves the legal owners who sold the property without disclosing to the purchaser for value the existence of the equitable interests.

(3) This rule applies only where the persons entitled to the legal and equitable interests have

equal rights in equity to them. They will not have equal rights in equity if the owner of the legal interest knew at the time he obtained the legal interest that it was held in trust for the person having the equitable interest, nor if it was through his fraud or negligence that such person was induced to give value for the equitable interest.

(4) Notice is either actual or constructive. By actual notice is meant knowledge of the existence of the equitable interests. By constructive notice is meant (a) knowledge of a fact which suggests the existence of the equitable interests, or (b) the possibility of obtaining, by the usual investigation of title which precedes purchase, knowledge of the existence, or knowledge of a fact which would suggest to a reasonable man the existence, of the equitable interests.

(5) Notice to the purchaser's agent is notice to the purchaser only when the agent receives the notice while carrying through his principal's purchase.

#### PARAGRAPHS (1) AND (2).

It is a principle of the common law that a grantor or vendor can give no better title to the thing granted or sold than he himself possessed. For the convenience of traders this principle has been departed from in one or two points, more especially in the case of negotiable instruments and sales of goods in market overt (see Stra. Property, p. 258). But the general rule is *Nemo dat quod non habet*. Thus, if A. has in him the legal title to Blackaere, of which B. has possession, the sale of Blackaere by B. to a purchaser who honestly and reasonably believes the legal title to be in B. will not in any way affect A.'s rights.

The principle upon which equity proceeds is that an equitable interest is merely an interest affecting the conscience of the legal owner. If the legal owner obtains his title in such a way that his conscience is not affected by the equitable interest, he is in no way bound by it. This can only occur when the person taking the legal estate (1) bonâ fide paid value for the property, and (2) at the time he did so had no notice, actual or constructive, of the equities affecting the conscience of the legal owner from whom he took it. Where these two conditions are fulfilled, the legal owner and the owner of the equitable interests are said to have equal equities, that is, equal rights to the property in a Court of Conscience, while the legal owner has also the legal title, and "where equities are equal" the maxim is that "the law shall prevail" (*Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259; Stra. L. C., p. 34).

Four points should be remembered in this connection :

The first is that the legal title obtained by the purchaser for value need not be an absolute legal title : it is only necessary it should be a good one as against the equitable owner. Thus, A. is trustee of Blackacre for B. Say the legal title of A. is a defective one and bad against C. A. sells Blackacre and conveys the legal estate to D. without disclosing the trust. D.'s title as regards C. is no better than was A.'s, but it is good in equity against B., since whatever legal interest in Blackacre A. held in trust for B. is now vested in D. (see *Jones v. Powles* (1834), 3 My. & K. 581).

The second point is that the legal estate need not be vested in the purchaser before he has notice of the equitable interests. It is only necessary that the value should be actually given before notice ; then if the legal estate is got in by the purchaser afterwards he can rely upon it. Thus, A. is owner of Blackacre subject to an equitable mortgage—that is, one which does not transfer the legal estate—made by him to B. A., without disclosing this equitable mortgage, makes another equitable

mortgage of Blakaere to C. for a further loan. C. afterwards discovers B.'s mortgage, and he thereupon induces A. to convey to him the legal estate in Blakaere as security for the loan. C. can rely on the legal estate as against B.'s prior equitable mortgage, since C., having had no notice of B.'s equitable mortgage at the time he advanced his money, has as good an equity to the land as B. has, and has besides since added to this the legal title (*Brae v. Duchess of Marlborough* (1728), 2 P. Wms. 491). This rule applies in all cases save where the conveyance of the legal estate would, to the knowledge of the purchaser, amount to a breach of trust on the part of the legal owner (*Taylor v. Russell*, [1892] A. C. 244, at p. 259; *Taylor v. London and County Banking Company*, [1901] 2 Ch. 234; *Shropshire Union Railways Company v. The Queen* (1875), 7 H. L. 496).

The third is that once a person has notice that an equitable interest has subsisted in property he is affected by it if he purchases the property, even though the vendor induced him by fraud to believe, and reasonably believe, that the equitable interest had determined; he buys at his own risk. Thus, A. in carrying through the purchase of Blakaere from B. discovers that it once has been subject to an equitable charge in favour of C. B. declares that the charge has been paid off, and shows A. what purports to be a receipt from C. for the amount of it. On this A. purchases Blakaere. As a fact the charge was not paid off, and the receipt is a forgery. A. is bound by the equitable charge (*Jared v. Clements*, [1903] 1 Ch. 428; Stra. L. C., p. 41).

The fourth is that notice of the equitable interest affects a legal owner only when the legal owner from whom he takes was bound by the equitable interest. Thus, if A., trustee of Blakaere for B., sells it in breach of trust to C., to whom it is conveyed without notice of the trust, C. is not bound by the trust for B. (*Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259). If then C. subsequently sells to D., who has notice of the trust, D. takes C.'s good title, and is bound no more than

C. was by the trust for B. If instead of selling to D., C. had resold to A., the result would have been different, because equity would not permit A. to take advantage of his own wrong by pleading that he had sold to C. without disclosing the trust affecting Blacknere (see *In re Stapleford Colliery Company, Barrow's Case* (1880), 11 Ch. D. 432, at p. 445).

It may be noted that the carrying over of a fund by the court in an administration suit to the separate account of a purchaser for value, does not confer on such purchaser a legal title so as to enable him to claim protection under this rule (*Cloutte v. Storey*, [1911] 1 Ch. 18).

#### PARAGRAPH (3).

This is usually summed up in the maxim that "it is only when the equities are equal that the law shall prevail."

In order that a purchaser for value without notice may obtain the protection of the legal estate it is not absolutely necessary that the legal estate should be conveyed to him; it is sufficient if, as among persons having equitable interests, he has the best right to call for it. Thus, if the legal owner (not being merely a trustee for another) declares himself trustee of it for the benefit of the purchaser, that will give the purchaser priority over other persons having equitable interests (*Mumford v. Stohwasser* (1871), L. R. 18 Eq. 556). In the same way if a trustee gives in breach of trust an equitable mortgage on the trust property, the mortgagee cannot, after notice of the trust, gain priority over the persons for whom the property is held in trust by getting in the legal estate from the trustee, since the latter could not, to the knowledge of the mortgagee, convey the legal estate to him except in breach of trust (*Perham v. Kempster*, [1907] 1 Ch. 373). Again, the legal estate will not protect a purchaser for value against equitable interests subsisting at the time, or even those created afterwards, if he has by his conduct enabled the legal owner to commit a fraud on the other person equitably entitled. Thus,

where a legal mortgagee returns the title-deeds to the mortgagor, and the latter deposits them with a banker, who knows nothing of the legal mortgage, to secure an overdraft, the legal mortgagee may be postponed to the banker, who has only an equitable title (*Briggs v. Jones* (1870), L. R. 10 Eq. 92). In other words, the legal title is a protection only where the equities are equal, and where they are not equal he who has the best equity will be preferred (see *Oliver v. Hinton*, [1899] 2 Ch. 264; *Walker v. Linom*, [1907] 2 Ch. 114; and *Stra. Mortgages*, pp. 59—70).

#### PARAGRAPH (4).

By sect. 3 of the Conveyancing Act, 1882, it is enacted :

“A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

“(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or,

“(ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.”

The above is the statutory definition of constructive notice. Whether the definition helps in any way to make the law on the point clearer is a matter of opinion.

An instructive case on constructive notice is *Hunt v. Luck*, [1902] 1 Ch. 428. There A., the owner of certain property, had let the same to certain tenants who paid their rents to W., a rent agent. W. transmitted the rents to G., who again forwarded them to A.; but in fact A. had conveyed the property to G., though this was

not known until after A.'s death. Meanwhile G. mortgaged the property to H. The paper title to the property being complete, H. had merely made some inquiries as to its value, and his agent in so doing became aware that the tenants paid their rent to W. After the death of A. his real representative applied to the court to have the conveyance to G. set aside. H. objected on the ground that he was a purchaser for value from G. without notice : —*Held*, that as against H., the conveyance could not be set aside. “The rule established . . . may be stated thus : (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights : (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights” (*per FARWELL, J.* : cited in the Court of Appeal with approval, [1902] 1 Ch. 432). The receipt of rents by a rent agent as in this case is, of course, not inconsistent with the title of the vendor, and, therefore, does not, as the phrase is, “put the purchaser on inquiry.”

The inquiries which “ought reasonably to have been made” include inquiries such as prudent purchasers make into the vendor's title quite independently of the rights of the purchaser on an open contract (*i.e.*, one not defining the length of title to be disclosed by the vendor in his abstract). Thus by sect. 3 (1) of the Conveyancing Act, 1881, on an open contract for the purchase of a sub-lease the purchaser is not entitled to call for the title to the leasehold out of which the sub-lease arises. This, however, will not prevent the purchaser of the sub-lease from having constructive notice of everything he would have learnt had he investigated the lease (*Imray v. Oakshette*, [1897] 2 Q. B. 218 ; and see *Patman v. Harland* (1881), 17 Ch. D. 353).

This rule applies even where there was, in fact, no sale to the new owner. Thus where a person entered without title upon land and retained possession of it for twelve years without acknowledging the true owner's title, he obtained under the Real Property Limitation Act, 1874, a good title against the true owner, but he was held to be bound by certain equities of which he would have obtained

notice had he had an inspection of the true owner's title-deeds (*In re Nisbet and Pott's Contract*, [1906] 1 Ch. 386; Stra. L. C., p. 45). *Sed quare*, since the legal estate upon which the equities depended for existence was not taken over from the true owner but was put an end to by the long possession of the occupier who thereby acquired a new legal estate.

One more example of the application of this doctrine of constructive notice is very important, because of its bearing on equitable mortgages. Such mortgages, as we shall see, are frequently made simply by deposit of the title-deeds of property as security for a loan. It has been held that if the title-deeds are not produced and on inquiry the vendor gives a reasonable excuse for their absence, the absence is not in itself sufficient to give the purchaser notice of the equitable mortgage (*Espin v. Pemberton* (1859), 3 De G. & Jo. 547, and see *In re Green*, [1907] 1 I. R. 57). A failure, however, to inquire as to the reason why the title-deeds are missing is sufficient to fix the purchaser with notice of any rights to which the person who has possession of them is in equity entitled over the property sold (*Mawfield v. Burton* (1873), L. R. 17 Eq. 15).

(As to how far, in the case of land, registration affects notice, see Stra. Property, pp. 216, 217.)

#### PARAGRAPH (5).

Notice given to the solicitor of a purchaser is notice (sometimes called *imputed notice*) to the purchaser whether the solicitor communicates it to the purchaser or not, unless the notice related to the solicitor's own fraud (*Waldy v. Gray* (1875), L. R. 20 Eq. 238). But notice must be received by the solicitor of the purchaser "as such." As to the meaning of this, see *per* Lord HERSCHELL, L.C., in *Thorne v. Heard and Marsh*, [1895] A. C. 495, at p. 501.

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**ART. X.—***Equitable Interests might always be held by Married Women.*

Legal interests could not (until the common law was altered by Act of Parliament) be held by a married woman separately from her husband; nor could they be rendered inalienable during the continuance of the marriage, or during *coverture* as it is called. Equitable interests could always be so held by a married woman if the instrument conferring them on her so directed, and a direction in such instrument that she shall not be at liberty to alienate them effectually restrains her from alienating them during *coverture*.

It will be necessary later to discuss fully the position of married women in equity as regards their capacity to take, hold, and dispose of, property (Art. CXLVI.). At present it is sufficient to note that at common law a married woman was under a complete incapacity during *coverture* of holding any kind of property independently of her husband. In equity, on the other hand, she was subject to no such incapacity, and the Court of Chancery only recognised marriage as a disability to the extent of allowing it to be a good ground for dispossessing a married woman of her power to dispose of her property while she remained married.

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**ART. XI.—***Equitable Interests in Realty may be Personality and vice versa.*

Whether legal interests are realty or personality always depends solely upon the actual nature of the particular legal interest. Whether equitable interests are realty or personality

depends upon the nature of the transaction which brought the particular equitable interest into existence. If in the view of equity by reason of the nature of that transaction they ought to be considered personality they will be so considered although they subsist in freehold lands, and if they ought to be considered realty they will be so considered although they subsist in chattels.

For present purposes it is sufficient by an illustration or two to explain the difference between the legal and equitable principles above stated.

At law, whether property is realty or personality depends on the actual nature of the particular interest, and not in any respect on the wishes of its owners. For example, A. is owner of the fee simple of Blackacre. That interest is realty with all the incidents of realty. Suppose A. declares himself trustee of it for B., C. and D. upon trust to sell it at his discretion and divide the proceeds in equal shares among them. B., C., and D., then become the equitable owners of the fee simple of Blackacre. That, however, remains in law still vested in A. and still has all the incidents of realty. If A. dies intestate the fee simple would at common law descend to his heir. But B., C., and D.'s equitable interests are personality from the moment the trust is declared, and this whether A. in fact sells Blackacre or not. Thus on the death of one of them his interest in Blackacre would devolve not for the benefit of his heir but for the benefit of his personal representatives.

This is an example of the doctrine of *conversion* or "the notional change of land into money or money into land" (Art. LXXXVIII.).

Again, X. is owner of the fee simple of Whiteacre. He mortgages it to Y. to secure a loan. In law the effect of this is that Y. takes the fee simple and on his death intestate it would at common law descend to his heir.

But in equity he will be regarded as having simply a money charge upon Whiteacre, and the right to this in equity is personalty, and so will devolve like other personalty for the benefit of his next of kin.

This, like conversion, is based on the principle that equity looks not to the form but to the intent of the parties and tries to carry that out.

Once equity regards interests subsisting in freehold land as personalty, or interests subsisting in chattels as realty, it attaches the usual legal incidents of personalty and realty to them. Suppose trustees are directed to sell shares and invest the proceeds in freehold land. The equitable interest in such shares immediately becomes a fee simple and, like any other fee simple, may be limited in the ordinary freehold estates—estates for life, in tail, and in fee simple.

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#### ART. XII.—*Equitable Interests in Land not the Subject of Tenure.*

Legal interests in freehold lands always are, while equitable interests in freehold lands, even when such interests are unconverted, never are, the subject of tenure. Equitable interests are therefore free in general from the incidents of tenure. Thus they have always been capable of being created and assigned without feoffment; and fees in equitable realty might and still may be created and assigned without words of inheritance. Again, a husband's equitable fee tail or fee simple was not on his death liable to dower until the Dower Act, 1833, though a wife's equitable fee tail or fee simple was liable to curtesy. Again, an equitable contingent remainder was never liable to fail by the determination of the preceding interest

before it was ready to vest, though it and all other equitable interests in expectancy are now subject to the rules against perpetuities, and (if they subsist in land) against double possibilities. Finally, an equitable fee simple was not, on the death of its owner intestate and without heirs, liable to escheat, but sank into the land for the benefit of the owner of the legal interest in the trust property, who was called the *terre-tenant*. Now, by the Intestate Estates Act, 1884, an equitable fee simple is to escheat as if it were the legal fee simple of the land in which it subsists.

It is commonly said that the reason equitable interests are not subject to the incidents arising out of tenure is because the seisin is not in the equitable owner but in the legal owner. This is certainly what justified the Court of Chancery in holding, and enabled it to hold, that such incidents did not affect equitable interests. It justified the court in doing so since it left the legal owner subject to answer all the burdens imposed by tenure (see *Copestake v. Hooper*, [1908] 2 Ch. 10), and so, in theory at least, did not injure the rights of the lord. It enabled it to do so since seisin is the foundation of ownership at common law, and one who has not the seisin is regarded as having no legal interests in the land. Consequently the Common Law Courts refused to recognise equitable owners, and left the Court of Chancery a free hand to settle for itself what were the incidents which should attach to equitable estate.

That the court took advantage of this to declare that many legal incidents affecting legal freeholds did not affect equitable freeholds may, however, rather be referred to the fact that the court held such incidents undesirable than to any merely technical rule. The Article itself shows that the court when it thought proper attached incidents based on tenure to equitable interests. Thus a husband's right of curtesy (*Casborne v. Scarfe* (1737), 1 Atk. 603) and the operation of a fine or recovery in

barring estates tail both depended on tenure (*North v. Way* (1681), 1 Vern. 13). As we shall see (*infra*, Arts. XIV. and XV.), many other legal incidents were also attached to them. And some others, as the Article itself shows, have been attached by special statutes.

As to the nature of tenure, see Stra. Property, p. 19 : of feoffment, *ibid.*, p. 241 ; of dower, *ibid.*, p. 311 ; of contingent remainders, *ibid.*, p. 157 ; and of escheat, *ibid.*, pp. 29, 307.

Formerly the old rule that an estate could not be limited to the unborn child of an unborn person (usually called the rule against double possibilities), was thought not to apply to equitable interests. It has been held recently that it does, at any rate when they subsist in land (*In re Nash, Cook v. Frederick*, [1910] 1 Ch. 1).

In no particular is the contrast between legal and equitable estates more remarkable than as regards the limitation *inter vivos* of estates in fee. It was, and still is, an inflexible rule of the common law that a fee—that is, a heritable estate—cannot be granted without words of inheritance ; that is, the grant must be not merely to the grantee but to him “and his heirs” or “and the heirs of his body” (or, since sect. 51 of the Conveyancing Act, 1881, to him “in fee simple” or “in tail”). Thus, where the grant was to the grantee merely, but the interpretation clause stated that “grantee” was to mean “grantee, his heirs and assigns,” this was held insufficient to transfer a fee simple (*In re Ford and Ferguson’s Contract*, [1906] 1 I. R. 607). On the other hand, when merely the equitable estate in freeholds is being dealt with, words of inheritance never were and are not now necessary to assign a fee. All that is necessary is that the grantor’s intention to pass the equitable fee should be made clear by any words whatever (*Tringham v. Greenhill*, [1904] 2 Ch. 487). This rule as to equitable estates, like many others, has been extended by Courts of Law to gifts of legal estate by will ; see Stra. Wills, pp. 15–19.

**ART. XIII.—*Equitable Personality may be held in Successive Estates.***

Legal interests in personality cannot (at any rate, at common law) be divided up into parts to be enjoyed in succession by different owners. Equitable interests in personality though unconverted, and equitable interests in realty though converted, can be so divided up. The parts can, however, only be of two kinds, namely, partial interests, such as life estates or estates for years, and absolute interests in remainder following these. In equity as in law heritable estates cannot be created in personality. But if equitable interests in personality are converted, then they are realty, and where they are absolute they can be limited out in fees tail and fees simple as freely as if they were legal interests in freeholds.

If at common law the owner of personality assigned it to A. for life and then to B. absolutely, A. became immediately entitled absolutely to the personality, and the gift over on A.'s death to B. failed. If, however, the owner had assigned the personality to X., and directed him to hold it for the benefit of A. for life, and then for B. absolutely, the Court of Chancery would have compelled X. to carry out this trust. A. could have claimed only the income during his life, and on his death B. would have been entitled to require X. to transfer the personality to him.

While equity thus allowed limited interests to be created in personality, it did not allow estates such as at law could subsist only in realty to be so created, except in cases of conversion. These estates were heritable estates, namely, fees simple and fees tail. If the owner of personality transferred it to X. to hold it for the benefit of A. for life, and then for the benefit of B. and his heirs,

or of B. and the heirs of his body, on A.'s death B. became entitled absolutely (*Elton v. Eason* (1812), 19 Ves. 73; and Under. and Stra. Interpretation of Wills, p. 218).

But as already pointed out, if personality is converted into equitable realty, or realty into equitable personality, the ordinary incidents of realty and personality immediately attach to it (see Art. LXXXVIII.).

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#### ART. XIV.—*Assignment of Equitable Interests.*

(1) Legal interests formerly were in many cases unassignable; equitable interests, save as mentioned in Art. X., were always assignable.

(2) Equitable interests were formerly assignable by parol, but since the Statute of Frauds, 1677, they are—at any rate, when they arise under express trusts—assignable only in writing; subject to this exception, that an equitable estate tail was formerly barable only by a fine or recovery, and since the Fines and Recoveries Act, 1833, is barable only by a deed enrolled.

(3) On the assignment of an equitable interest, the assignee takes it subject to prior equitable interests affecting it in the hands of the assignor, whether he gives value for the assignment or not and whether he had notice of the prior equitable interests or not.

(4) This last principle is subject to the qualification that where the assignment is of an

interest in equitable personality the assignee will not be postponed to prior equitable interests unless the owners of these have given the legal owners of the personality notice of them.

#### PARAGRAPH (1).

It seems doubtful whether at one time fees could be transferred at law at all (see Stra. Property, pp. 38, 39), and until recent times many contingent interests in realty and choses in action (see Stra. Property, pp. 344—350) were unassignable. These now have by various statutes been declared capable of being assured at law. But as a general principle, wherever equity created an equitable interest, it permitted it to be assured, subject to the exception stated in Art. X. Moreover, equity permitted equitable interests in many unassignable legal interests to be created by declaration of trust. This formerly led to many difficulties as to whether the legal owner intended a gift at law or a declaration of trust in equity—difficulties not yet got over, since frequently a gift in law, to be valid, must be made by deed or with some other formality not required for a valid declaration of trust.

#### PARAGRAPH (2).

Before the Statute of Frauds, all equitable interests, except an equitable fee tail, could be transferred *inter vivos* or *mortis causâ* by parol—that is, without a written instrument of any kind. Section 9 of the statute, however, enacted that “all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by such last will or devise or else shall be utterly void and of none effect.”

It is to be noticed that this enactment does not refer to the *creation* of equitable interests by declaration of trust (Arts. XXI. and XXII.) ; that it does refer to assignments of trusts of all kinds of property and not merely of land ; and that a will devising or bequeathing

an equitable interest must now conform to the requirements of sect. 9 of the Wills Act, 1837 (see Stra. Wills, pp. 45—51).

The courts, in order to preserve the peculiar characteristics of fees tail, held that they could be barred—*i.e.*, turned into fees simple—only by fines or recoveries, though these properly were adapted to deal with the legal estate. The Fines and Recoveries Act, 1833, following this principle, made equitable fees tail barrable, like legal fees tail, only by deed enrolled (see Stra. Conveyancing, pp. 21—24).

### PARAGRAPH (3).

As between persons entitled to equitable interests in the same property, the equitable doctrine as to the priority of a purchaser for value without notice has no place. The legal rule *Nemo dat quod non habet* applies to them as it does to persons entitled to legal interests, and accordingly the purchaser for value of an equitable interest takes subject to all other equitable interests preceding in point of time the interest he purchases. This is usually summed up by the maxim: “Who is first in time is stronger in right”—*Qui prior est tempore potior est jure*.

One example of this doctrine is sufficient for purposes of illustration. In *Care v. Care* (1880), 15 Ch. D. 639, A., the trustee for X. of certain funds, invested them in breach of trust in the purchase of Blackacre, the conveyance of which was taken in the name of A.’s brother B. Now Blackacre having been bought with trust funds, the equitable estate in it belonged to X., just as previous to the purchase he was entitled to the equitable estate in the trust funds. Afterwards B. borrowed money from C., who had no notice of the trust for X., and as a security gave a legal mortgage of Blackacre—that is, a mortgage which transferred the legal title to Blackacre—to C. Subsequently B. borrowed further money on a second mortgage of Blackacre—which, as we shall see, was an equitable mortgage—from D., who, like C., had no notice of the trust for X.

On the question as to the priorities of X., C., and D. arising :—*Held*, that C., as having the legal title to Blackacre, took priority over X. and D., who were only equitably entitled. As between X. and D., X. was entitled to priority as, though D. was a purchaser for value of an equitable interest, yet X.'s interest preceded D.'s in point of time, and so the maxim *Qui prior est tempore potior est jure* applied. (And see *Cloutte v. Storey*, [1911] 1 Ch. 18.)

It may just be added that the rule applies not merely to prior equitable interests—in the sense of estates—but to what may be called equitable easements. Thus if A. on conveying Blackacre to B. covenants not to build on certain portions of Whiteacre, which he retains, this covenant does not at law run with Whiteacre (see *Spencer's Case* (1584), 5 Coke, 16). It does, however, operate in equity against any purchaser of the legal estate in Whiteacre who takes with notice, and against any purchaser of the equitable estate whether he has notice or not (see *Rogers v. Hosegood*, [1900] 2 Ch. 388, at p. 406).

This equitable principle—that an equitable assignee takes subject to all equities—is now extended to debts and other legal choses in action which were before the Judicature Act, 1873, assignable only in equity. Sect. 25 (6) of that statute makes such legal choses in action assignable at law by writing under the hand of the assignor with written notice to the debtor, trustee, or other person liable. But such assignment is made expressly “subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed.” (As to what amounts to an assignment under this section, see *Brandt, Sons and Company v. Dunlop Rubber Company*, [1905] A. C. 454.)

#### PARAGRAPH (4).

The rule *Qui prior est tempore potior est jure* is subject to a limitation when the equitable interest concerned is personality. If a person who has an equitable interest which, whether it subsists in legal realty or in legal

personalty, can only be claimed in equity in the form of money or other pure personality, as for instance an interest in a freehold estate which is vested in trustees upon trust to sell and divide the proceeds among the assignor and other persons (*Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865), assigns his interest first to A. and afterwards to B., B. having no notice of the previous assignment to A., then the right to the equitable interest assigned depends not on the priority in point of time of the assignments to A. and B., but upon the priority in point of time of the notice of such assignments which shall be given to the trustees of the legal property (*Re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151). This is usually called the rule in *Dearle v. Hall* ((1823), 3 Russ. 1; Stra. L. C., p. 53). Thus in *Montefiore v. Guedalla* ([1903] 2 Ch. 26), A., a Jewess, married in Morocco and on her marriage an instrument called a "ketubah" was executed under which the children of the marriage were entitled to interests in her property. Certain funds belonging to her were paid by her trustees in England into court. A. died intestate, and her husband took out administration to her estate. As her administrator he assigned for value A.'s property in court to B. B. had no notice, and no notice had been given to A.'s trustees, of the "ketubah." B. gave notice of his assignment by obtaining what is called a "stop order"—that is, an order not to pay the money out of court without notice to him:—*Held*, that B. was entitled in consequence of such notice to priority over the children of A. (And see *In re Kinahan's Trusts*, [1907] 1 I. R. 321.)

Four further points as to the notice to be given to the trustees should be remembered. In the first place, such notice is not the technical notice which we are to deal with in the next note. Here notice is a matter of fact. The test is whether the trustee received actual knowledge of the assignment or such information in regard to it as would induce a business man to act upon it (*per Lord CAIRNS, C.*, in *Lloyd v. Banks* (1868), L. R. 3 Ch. 488, at p. 490, but cf. *Davis v. Hutchings*, [1907] 1 Ch. 356). Secondly, notice to the trustee's solicitor is not notice to the trustee unless the trustee has

authorised the solicitor to receive notice (*Saffron Walden Building Society v. Rayner* (1880), 14 Ch. D. 406); and where one of several trustees is himself the equitable owner who assigns, notice of the assignment must be given to the other trustees (*Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865). Thirdly, it would seem that where notice is given by an assignee to one only of several trustees, and after the death of such trustee notice is given by a subsequent assignee to the other trustees, such subsequent assignee is entitled to priority over the earlier assignee (*Re Phillips' Trusts*, [1903] 1 Ch. 183). *Sed quare* (*cf. Ward v. Duncombe*, [1893] A. C. 369, at p. 394). And fourthly, the notice must be given to the trustee after he becomes trustee, notice given before then being no notice (*In re Kinahan's Trust*, [1907] 1 I. R. 321).

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#### ART. XV.—*General Rule as to Equitable Interests.*

Subject to the above qualifications the general rule is that equity follows the law, and that equitable interests have in general the same incidents and attributes as have the corresponding legal interests.

This general rule is shortly summed up by the maxim : “Equity follows the law.”

At first the tendency of the Court of Chancery seemed to be to treat equitable interests in property as merely rights of action of the equitable owner against the legal owner (see *Sir Moyle Finch's Case* (1590), 4 Inst. 86). Gradually, however, as the principles affecting them became settled, the court held that, save as to certain points, equitable estates were to have the same incidents as legal estates (*Hopkins v. Hopkins* (1739), West t. Hard. 606; *Burgess v. Wheate* (1759), 1 Eden. 177; Stra. L. C. p. 25). And this rule was not confined to equitable estates arising by way of express trust but extended to those arising out of legal mortgages

(*Casborne v. Scarfe* (1737), 1 Atk. 603), and even to such equitable rights as that to set aside a legal conveyance obtained by undue influence or fraud (*Stamp v. Gaby* (1852), 2 D. M. & G. 623).

It follows from the principle stated in the Article that equitable interests can be settled, mortgaged, and disposed of, precisely in the same way as legal interests. A legal interest can be validly conveyed to a grantee unknown to him and so can an equitable interest (*In re Pidcock* (1907), 51 Sol. J. 574). Again, a bankrupt cannot give a good title to legal realty nor can he to equitable (*Official Receiver v. Cooke*, [1906] 2 Ch. 661). Moreover, an equitable interest on the death of the owner devolves precisely as would the legal interest, being equally affected by any peculiar custom of descent, like that characteristic of gavelkind or borough-English (see *In re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655). There is this difference, however—that while the legal estate in copyholds does not come within the Land Transfer Act, 1897, and does not, therefore, devolve on the personal representatives of the tenant, the equitable estate in copyholds does (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583). This is only applying the rule that equitable interests are not the subject of tenure (see Art. XII.).

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#### ART. XVI.—*Purposes for which Equitable Interests and other Rights were Created.*

The Court of Chancery being a Court of Conscience, the equitable interests and other equitable rights created by it were created primarily for one or other of three purposes :

- (1) To protect confidences ;
- (2) To promote fair dealing ; and
- (3) To prevent oppression.

It used to be said that the Court of Chancery, as a Court of Conscience, had jurisdiction over matters arising out of accident, fraud, and things of confidence. It is open to doubt whether this ever was a sufficient statement of the various grounds upon which the court conferred equitable rights. It certainly is not now, unless perhaps the phrase "things of confidence" is taken in the vague sense referred to in Art. VIII. It is submitted, in any case, that the above Article sets out these purposes more accurately and affords a means of roughly classifying equitable rights.

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## FIRST DIVISION OF EQUITABLE RIGHTS.

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### EQUITIES TO PROTECT CONFIDENCES.

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### NATURE OF TRUSTS OR CONFIDENCES.

#### *ART. XVII.—Trusts and their Divisions.*

- (1) Where property becomes vested in a person—
  - (i) Subject to an explicit undertaking on his part which the court will enforce to hold it for the benefit of some other person or object, *or*
  - (ii) Subject to no such explicit undertaking, but under circumstances from which the court will presume that it was intended that the property should be held for the benefit of the person who provided it or some other person, *or*

- (iii) Subject to no such explicit or presumed undertaking, but by means of an abuse of confidence of such a character that the court will compel the person in whom the property has become vested to hold it for the benefit of the person damaged by the breach of confidence.

Then there arises a trust, in the more specific sense of that word, of such property.

(2) Trusts of the first kind are called *declared* or *express trusts*; trusts of the second kind may be called *presumptive* or *implied trusts*; and trusts of the third kind may be called *constructive trusts*.

(3) Trusts, whether express, presumptive, or constructive, in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust are called *resulting trusts*.

Thus, if A. conveys Blackacre to B. and directs him to hold it for the benefit of B. for life and afterwards for the benefit of B.'s children, A. creates a declared trust. If A., however, bought Blackacre and had it conveyed, not to himself, but to B., *prima facie* B. would be a presumptive trustee of Blackacre for A. This would also be a resulting trust, since B. would be a trustee of Blackacre for A., who provided the funds to purchase it. Lastly, if B., being trustee of a leasehold for A., obtained a renewal of such lease for his own benefit, he would be constructive trustee of the renewed lease for A.

## PARAGRAPH (1).

No endeavour is here made to define a trust. Most of those writers or judges who have attempted such a definition have done little to assist the world to a clear conception of what a trust is. As far as my reading has gone, the best definition or description seems to be that of Mr. Underhill. He defines a trust thus : "A trust is an equitable obligation, either expressly undertaken or constructively imposed by the court, whereby the obligor is bound to deal with property over which he has control for the benefit of persons of whom he may or may not himself be one and any one of whom may enforce the obligation." (*Under. Trusts*, p. 1). This is a very complete description of the ordinary private trust but it would need modification to cover some exceptional private and all charitable trusts (see *infra*, Arts. XXVIII. and LXXX.).

I think the better course is to point out first merely how trusts arise and subsequently deal *seriatim* with the characteristics of each class.

The distinction between the first and second classes of trusts is merely one as to evidence. They are both based on the intention to create a trust, but in the first class the intention is evidenced by the language or conduct of the parties, while in the second class it is presumed from the relationship between the parties. Mr. Ashburner has on this account treated the second class as a subdivision of the first, and discussed it under the heading of Interpretation of Trusts (*Ash. Equity*, p. 143). This, I think, is hardly correct, since there can be no question of interpretation where there is no declaration to interpret (*cf. Birmingham, Dudley and District Banking Company v. Ross* (1887), 38 Ch. D. 295). The trust is presumed simply because it is not declared. Still, this arrangement is better than that which places the second and third classes of trusts together under one head, as distinguished from the first class. The real distinction is between the first and second classes and the third, since the first two are based on the intention, while the

third is created by the court independently of (and usually in opposition to) the intention of the party bound by it.

#### PARAGRAPH (2).

I have adopted the name of "declared" trusts (which is that used by Mr. Underhill) in preference to "express" trusts, which is that commonly adopted, because the term "express" trust is used in very different senses. Thus, according to Lord NOTTINGHAM, express trusts include both the first and second classes of trust (*Cook v. Fountain* (1676), 3 Sw. 585, at p. 591), an arrangement accepted by Mr. Ashburner. On the other hand, the term is also used to cover all three classes in connection with the practical question as to whether or not the person bound by the trust can plead the Statutes of Limitations or is liable to contempt for a breach of trust (see *infra*, Arts. LXXI. and LXXXVI.).

The term "presumptive" trust for the second class is justified, so far as authority is needed, by the dictum of Lord NOTTINGHAM above referred to. Besides this it seems suitable as fixing the attention of the reader on the cardinal difference between the modes in which presumptive and declared trusts arise.

The term "constructive" trust, which is frequently used to cover both the second and third classes, seems to me appropriate to the third class only. "Constructive," in legal phraseology, is opposed to "actual." See, for instance, constructive notice (*supra*, Art. IX.). And the third class of trust is based on this—that there has been no actual trust, but the court for its own purposes treats the transaction as if there had been.

#### PARAGRAPH (3).

The term "resulting" trust, besides being used in the meaning given it in the Article, is also employed to describe the classes of trusts above called presumptive and constructive. There is this much to be said for this use of

the term, that it draws attention to the fact that both these classes of trusts are outside the provisions of the Statute of Frauds, 1677, which requires declared trusts of certain kinds to be evidenced in writing (see *infra*, Art. XXI.). And, besides, most presumptive and constructive trusts are also resulting in the sense stated in the Article. But so are many declared trusts. The consequence of using the term in two senses is that declared resulting trusts are liable to become confused with trusts arising by implication or construction of law. For a flagrant example of that and other confusions, see *In re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655. Accordingly, I shall throughout use “resulting” trust in the one sense only—that is, as describing a trust where the benefit goes back to the settlor whether by express limitation or by operation of law.

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ART. XVIII.—*Kinds of Declared Trusts.*

The law relating to declared trusts varies according as the object of the trust is or is not the advancement of a charitable purpose. If the object is the advancement of a charitable purpose, the trust is called a *charitable trust*; if the object is the benefit of a person or a number of specified persons, or is the advancement of a purpose, public or private, which is not charitable, the trust is called a *private trust*.

Private trusts for the advancement of a purpose, public or private, will be considered in Art. XXVIII.

It is often very difficult to decide whether any particular trust is private or charitable. For the present we may assume that every lawful trust, whatever may be the objects it is intended to benefit, is a private trust unless the object is a charitable purpose. Later we shall consider what amounts to a charitable purpose (see *infra*, Art. LXXV).

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## A.—PRIVATE TRUSTS.

ART. XIX.—*Divisions of Subject.*

The law relating to declared private trusts will be considered under the following heads :

- (i) The formation of a trust ;
  - (ii) Trustees : their kinds, appointment, retirement, and estate ;
  - (iii) Trustees : their duties, powers, and privileges ;
  - (iv) Cestuis que trust and their rights ; and
  - (v) Breach of trust.
-

## CHAPTER I.

## FORMATION OF A TRUST.

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**ART. XX.—*Parties necessary to the Formation  
of a Trust.***

(1) To the constitution of a declared private trust other than one for the advancement of a purpose, public or private, three parties are necessary :

- (i) The party who owns the property which on the constitution of the trust is directed to be held for the benefit of certain persons. He is called the *settlor*.
- (ii) The party who undertakes to hold the property for this purpose. He is called the *trustee*.
- (iii) The party for whose benefit the property is to be held. He is called the *cestui que trust*, or *beneficiary*.

(2) The settlor is the person entitled to direct for whose benefit the property is to be held.

His direction is called the *declaration of trust*, and where this is in writing the writing is called the *trust instrument*. The property is called the *trust property*. The interest in it taken by the cestui que trust is called the *beneficial estate*; that taken by the trustee the *trustee's estate*.

(3) Each of the parties to a trust may consist of several individuals, while, on the other hand, one individual may discharge the functions of any two or of all three parties, subject to this limitation, that the same individual cannot be at the same time sole trustee and sole cestui que trust.

#### PARAGRAPHS (1) AND (2).

If, for instance, A. conveys Blackacre to B. and his heirs to hold the same for the benefit of C. and his heirs, and B. by accepting Blackacre thereby agrees so to hold it, A. is then the settlor, B. is the trustee, and C. is the cestui que trust. The direction of A. so to hold Blackacre is the declaration of trust, and if it is in writing—as in this instance it must be (see *infra*, Art. XXI.)—the writing will be called the trust instrument. Blackacre is the trust property, the interest taken by B. is the trustee's estate, while that taken by C. is the beneficial estate.

It is to be noted that the trust property may itself be an equitable estate. Thus, in the above example, A. may be owner of Blackacre subject to a legal mortgage for £10,000 owed to X.; or again Y. may be trustee of it for A. In both these cases A.'s estate in Blackacre is merely equitable, the legal estate being in the first instance in X. and in the second in Y. As A. has only an equitable estate in Blackacre, that is all he can transfer to B., who would accordingly be trustee of the equitable estate for the benefit of C. For this reason it seems to be less misleading to call the estate taken by the trustee the trustee's estate, and that taken by the cestui que trust

the beneficial estate, than to apply to them respectively the terms "legal estate" and "equitable estate," as is usually done.

Where the trust property is equitable, the person by law entitled to declare the trust is the owner of the equitable interest, and not the person entitled to the legal estate (*Kronheim v. Johnson* (1877), 7 Ch. D. 60).

### PARAGRAPH (3).

"Each of the parties to a trust may consist of several individuals." Thus, in the above example, A. and his wife may be jointly entitled to Blackacre and may jointly convey it to the trustee. Here there are two settlors. And they may convey not to B. solely, but to B., F., and G. jointly, and direct B., F., and G. to hold it, not for the benefit of C. solely, but for C. for life and then for C.'s children. In this case there would be (as in practice there almost invariably are, at least when the trust is first created) several trustees and several cestuis que trust. On the other hand, A., instead of conveying Blackacre to B., may declare himself trustee of it (see *infra*, Art. XXVI.) for C. and his heirs, in which case A. would be both settlor and trustee, or he may declare himself trustee of it for himself for life and then for C. and his heirs, in which case he would be settlor, trustee, and one of the cestuis que trust. Any number or combination of parties is legal save only this, that the same person cannot be at the same time sole trustee and sole cestui que trust, for he then has the whole interest in the trust property in himself, and he is not trustee of it but owner (*Selby v. Alston* (1797), 3 Ves. 339). This exception extends to cases where the legal estate is vested in two or more individuals if the same individuals each take precisely the like extent of interest in the equitable estate, even though the legal estate is vested in them as joint tenants and the equitable estate as tenants in common (*In re Selous, Thomson v. Selous*, [1901] 1 Ch. 921).

## ART. XXI.—*Declaration of a Trust to Operate Immediately.*

When a declaration of trust is intended to come into operation at once it may be made in writing, by word of mouth, or by conduct; subject to this restriction, that if the trust property consists of freehold, copyhold, or leasehold interests in land, before the court will enforce such trust the terms of it must be reduced into writing, and such writing must be signed by the settlor, as required by the Statute of Frauds, 1677.

Trusts *inter viros*, whether of land or goods, were originally averrable—*i.e.*, they could be validly declared without writing of any kind. Thus, if A. declared himself by word of mouth a trustee of Blackacre for the benefit of himself for life and afterwards for the benefit of his children, this trust could be enforced against him or his heir, provided satisfactory evidence could be produced to the court of the declaration. This rule still applies to pure personality (see *McFadden v. Jenkyns* (1842), 1 Ph. 153). But by sect. 7 of the Statute of Frauds, 1677, all declarations of trusts of lands must be manifested and proved by some writing signed by the settlor. By sect. 8 this enactment is not to extend to trusts arising or resulting by implication or construction of law, *i.e.*, presumed and constructive trusts (see *Lloyd v. Spillet* (1740), Barn. Ch. 384, at p. 388).

Trusts arising by conduct within this Article do not include presumptive trusts, which arise by implication of law and which are confined to the classes set out in Arts. LXXXI. to LXXXIII., *infra*. The trusts declared by conduct, here referred to, are trusts arising through the settlor doing such acts as amount to clear evidence that he intends to constitute himself or another a trustee of his property for some one else (see *O'Flaherty v. Brown*, [1907] 2 I. R. 416). Accordingly trusts can

be proved solely by conduct only where the property is not land; since all declared trusts of land are, as stated in the Article, to be evidenced in writing.

The trust is to be merely proved, not declared, in writing. Therefore, if an oral declaration is afterwards reduced to writing, this will be sufficient to satisfy the statute (*Gardner v. Rowe* (1828), 5 Russ. 258; and see *New, Prance and Garrard v. Hunting*, [1897] 2 Q. B. 19; affirmed, [1899] A. C. 419), and the trust will operate or take effect, not from the time it was reduced into writing, but from the time it was orally declared (see *In re Holland, Gregg v. Holland*, [1902] 2 Ch. 360). And note that it is only a writing, not a deed, that is required.

The writing is to be signed by the person entitled to declare the trust, *i.e.*, the owner of the property (*Dye v. Dye* (1884), 13 Q. B. D. 147) or equitable interest (*Kronheim v. Johnson, supra*) of which the trust is declared.

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## ART. XXII.—*Declaration of a Trust to be Ambulatory till Death.*

Where a declaration of trust is intended to be ambulatory till the death of the settlor, then, whatever the nature of the property of which the trust is to be constituted may be, the language used in the declaration must be reduced into writing, and such writing must be executed as a will according to the requirements of the Wills Act, 1837, or (subject to the following Article) the declaration will be totally void.

An instrument is said to be ambulatory till death when it has no binding effect in law until then. Thus, if A., by writing, declares himself trustee of Blackaere for his own benefit for life and then for the benefit of his

children, the children immediately take equitable interests in Blackacre, though these do not vest in enjoyment until A. dies. But if A. by *will* devises Blackacre to C. and D. in trust for his children, the children have no interest, legal or equitable, in Blackacere till A.'s death. Until that time A. can deal with the property as he likes. He can sell it, or commit waste on it, without any one's consent. Not only so, but he can at any time revoke the will and devise Blackacre for other purposes than the benefit of his children.

Formerly sect. 7 of the Statute of Frauds, 1677, applied to declarations of trusts after death, but now the law as stated in the Article depends on the Wills Act, 1837.

The commonest example of attempts to evade the principle stated in the rule arises in the case of testators attempting to create secret trusts. These will be considered in the note to the next Article.

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### ART. XXIII.—*Fraudulent Repudiation of a Trust.*

Where a person has obtained possession of property by undertaking or consenting to hold it upon trust he will not be permitted subsequently to repudiate the trust and hold the property for his own benefit on the ground that the terms of the trust were not reduced into writing, as required by the Statute of Frauds, or that no will declaring the terms of the trust was made, as required by the Wills Act, 1837.

This Article applies only where the person taking the property has taken it in the character of trustee. This he may do either by expressly agreeing with the person giving it to him to hold it on trust or by accepting the property knowing he is to take it as trustee. Where he has not taken it in the character of trustee, there is

nothing contrary to conscience in his setting up the Wills Act or the Statute of Frauds against any attempt to bind the property with trusts. Thus if A. conveys Blackacre to B. without receiving value, but also without intimating to B. that he intends B. to hold it in trust for A., there is nothing to prevent B. pleading the Statute of Frauds if A. or A.'s heir subsequently alleges that such was A.'s intention (*Fowkes v. Pascoe* (1875), L. R. 10 Ch. 343, at p. 348; and see Presumptive Trusts, *infra*, Art. LXXXII). In the same way, if A. bequeaths £10,000 to B., B. appearing on the face of the will to take beneficially and B. not having during A.'s lifetime undertaken to hold it as trustee, it is open to B. to set up the Wills Act if after A.'s death a paper not signed as a will is found showing that B. was intended to hold it on certain trusts. He can set up the Wills Act, and hold the legacy for his own benefit (see *Re Boyes, Boyes v. Curritt* (1884), 26 Ch. D. 531; *Re Downing* (1889), 60 L. T. 140; cf. *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866).

A striking example of an application of this article to trusts *inter vivos* is the case of *Rochefoucauld (Duchesse de) v. Boustead*, [1897] 1 Ch. 196. There the defendant was the agent of the plaintiff for certain estates belonging to the latter. He and she entered into a verbal agreement whereby he became nominal purchaser of these estates, but in fact became trustee of them for her. For several years he rendered to her accounts, but finally he ceased to do so, and set up as a defence to an action brought by her that if there was any trust it could not be enforced as it had never been reduced into writing, as required by sect. 7 of the Statute of Frauds:—*Held*, that since he had received the estates as trustee he could not plead the statute in order to enable him to repudiate the trust.

Cases of the application of this rule are more frequent under wills. These cases form themselves into four groups: (i) Cases where the legatee is described in the will as a trustee of the legacy, but the trusts are not set out there. Here, in the absence of actual fraud on the part of the legatee, the trust fails, and the legatee holds as trustee for the residuary legatee or next of kin (*Re Hetley*,

[1902] 2 Ch. 866). (ii) Cases where the legatee is not described in the will as a trustee, but was informed by the testator that he was intended to take as a trustee. Here, if the legatee was informed of the particular trusts intended, he is bound to carry them out ; if he was not, he is a trustee of the legacy for the residuary legatee or next of kin (*Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531). (iii) Cases where there are several joint legatees, some of whom were, and some of whom were not, informed that they were to be trustees. Here, if the information was given to one of the joint legatees before the will was made, the shares of all the joint legatees go as if they all had been so informed ; while if the information was given to none of them until after the will was made, only the shares belonging to those who received the information are affected (*Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237 ; Stra. L. C., p. 78). This distinction is based on the supposition that it was the undertaking of the one joint legatee to act as trustee before the will was made that induced the testator to make his will as he did. (iv) Cases where there are several legatees who take as tenants in common, and some of whom only were informed of the trust. Here, whether the information was given before or after the will was made, the shares of those only who were informed of the trust are bound by it (*ibid.*).

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#### ART. XXIV.—*Declaration of Trust: the Three Certainties.*

(1) No formal language is necessary to constitute an effective declaration of trust but the language used must make it certain :

(i) That the settlor intended to constitute a trust binding by law on himself or on the person to whom the property was given ;

(ii) That he intended to bind definite property by the trust ;

- (iii) That he intended to benefit definite persons in a definite way.

If there is a failure as to (i) no trust is constituted ; if as to (ii) or (iii) a trust is constituted but it is void for uncertainty.

(2) Where the declaration takes the form of an agreement or direction for the subsequent execution of a proper trust instrument (iii) will be satisfied by a mere general indication of the settlor's intentions in that behalf.

Where the declaration takes the form of such an agreement or direction the trust declared by it is called an *executory trust*. Where the declaration itself sets out fully and formally the trust on which the trust property is to be held the trust declared by it is called an *executed trust*.

#### PARAGRAPH (1).

The three points which the language of the declaration must make certain are commonly called the *three certainties*.

As to (i) uncertainty as to this usually arises through the settlor not declaring that the person taking the property *shall* hold it on the trusts declared but "praying" or "desiring" him so to do. Thus, for example, in *Re Downing* (1889), 60 L. T. 140, a testator left his property absolutely to A. and B., "in the full confidence that they will carry out my wishes in respect thereof." It was held here that, in the absence of evidence that A. and B. had undertaken to carry out such wishes—which undertaking would have brought them within the preceding Article—no trust was imposed on A. and B., who therefore took beneficially. Again, in *Re Oldfield*, *Oldfield v. Oldfield*, [1904] 1 Ch. 549, a testatrix, after leaving property

to her two daughters absolutely as tenants in common, added, "My desire is that each of my said two daughters shall during the life-time of my son pay to him one-third" of the income accruing from the property given:—*Held*, that no trust in favour of the son was created, and the daughters took the whole property beneficially.

Formerly the court was inclined to hold that such expressions gave rise to trusts which, owing to the form of the expression, were called *precatory trusts*. Since the case of *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, Stra. L. C., p. 64, the tendency has been the other way. It is now settled that where a gift is made in words which clearly confer the property on a person other words following such words must be equally clear before the court will hold that they, in effect, take away the property previously given (see *per* Lord ESHER, M.R., in *Hill v. Hill*, [1897] 1 Q. B. 483, at p. 487).

Sometimes difficulty also arises where a special power to appoint among a class is given to a person but there is no gift over in default of appointment. Here in default of appointment the question arises: Was there a trust intended in favour of the class? It seems clear now that if the power is a power to appoint or not, as the donee pleases, among the class there is no such trust, but if it is a mere power to *select* out of a class those who shall take then there is such a trust (*Comiskey v. Bowring-Hanbury*, [1905] A. C. 84; *In re Atkinson* (1911), 80 L. J. Ch. 370; and see Under. and Stra. Inter. of Wills, pp. 96 *et seq.*).

The certainties required under (ii) and (iii) are not peculiar to declarations of trust but are necessary to all grants and devises. It is clear that if it is not certain what property passes under an instrument or to whom it passes it is impossible to carry out the transaction. The court applies rules for the purpose of solving as far as possible ambiguities on these points but such rules belong rather to the principles of interpretation of written instruments than to equity.

The important point to note is that where there is a failure of the first certainty there is no trust, and so, if the property has been transferred, the person to whom it has been transferred takes it beneficially. The cases *Re Downing* (*supra*) and *Re Oldfield, Oldfield v. Oldfield* (*supra*) are examples of this. On the other hand, where the first certainty is present but there is a failure as to the second or third the trust fails. If the failure is as to the second certainty, no property is affected by the trust, the intention of the intended settlor failing to operate. If the failure is as to the third certainty, then, if property has been vested in a trustee, he, being a trustee, cannot repudiate the trust (see Art. XXIII., *supra*), while owing to the uncertainty of the trust he cannot execute it. In this case he holds it for the benefit of the settlor, or if the settlor is dead for those who succeeded to his rights. The case of *Re Boyes, Boyes v. Carrigg* (1884), 26 Ch. D. 531, is an example. This is also an example of what is meant by a resulting trust.

#### PARAGRAPH (2).

By an executory trust is not meant a trust that is executory in the sense in which that word is used in respect to contracts—*i.e.*, to be performed in the future. All trusts are executory in that sense. It is executory in the sense that “it is to be executed by the preparation of a complete and formal settlement carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the” settlor (*per* Lord CAIRNS in *Sackville-West v. Viscount Holmesdale* (1870), L. R. 4 H. L. 543; Stra. L. C. p. 82). In the words of Lord ST. LEONARDS in *Egerton v. Earl Brownlow* (1853), 4 H. L. Cas. 1, at p. 210, in the case of an executed trust “the settlor has been his own conveyancer.” In the case of an executory trust it may be said that he has only given his conveyancer instructions to draft a settlement.

Thus, if the settlor directs his trustees that certain property shall be settled on A. as “counsel shall advise,” this is a good executory trust (*White v. Carter* (1766), 2 Ed. 366). So is a direction that certain freeholds,

leaseholds, furniture, and plate “shall follow the barony of B., as nearly as practicable, and according as the trustees shall think proper or counsel shall advise” (*Sackville-West v. Viscount Holmesdale, supra*). And see examples cited in the note to the next Article.

Executory trusts usually occur either in marriage articles—that is, informal written agreements made in contemplation of marriage as to the terms of the marriage settlements afterwards to be executed—or in wills, where directions are very frequently given that property left to women shall be “strictly settled.”

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#### ART. XXV.—*Interpretation of Declarations of Trust.*

In interpreting declarations of trust where the trust declared is executed, the court will construe the words and limitations contained in the declaration strictly according to their ordinary meaning, but where the trust declared is executory it will construe them in the sense in which it presumes the settlor would have expressed himself had he expressed his intentions fully and known the legal meaning attached to technical words and the technical rules as to the limitation of estates.

As said by Lord WESTBURY in *Sackville-West v. Viscount Holmesdale, supra*: “In construing the words creating an executory trust, a Court of Equity exercises a large authority in subordinating the language to the intent.”

A good example of this is the case of *In re Johnston-Cockerell v. Earl of Essex* (1884), 26 Ch. D. 538. There a testatrix left certain plate and a leasehold house directly to “Lord E, and to his successors, and to be enjoyed

with and to go with the title"; and then she bequeathed to her trustees certain other chattels upon trust to select and set aside part of them "to be held and settled as heirlooms, and to go with the title." The first of these bequests being a direct gift to Lord E. and his successors had to be interpreted according to law, and it was held that the effect in law of the bequest was to vest the chattels absolutely in Lord E. The second gift was by way of executory interest, and though neither in law nor in equity can chattels be made to accompany a title, yet in equity they can be held in successive interests. The court therefore directed the testatrix's intention to be carried out as far as possible by a settlement giving merely a life interest to Lord E., with limitations over making the chattels descend with the title as far as the rules of equity permit.

Again, the court, in interpreting the limitation arising under an executory trust, will not apply the rule in *Shelley's Case* so as to give a cestui que trust the fee simple or a fee tail where it was the clear intention of the settlor that he should only take a life interest. Thus, a settlor devised real estate to B. and C. upon trust till his granddaughter D. should marry or die, to receive the profits and thereout to pay her £100 a year for her maintenance, and if she lived to marry, then on her marriage to convey the estate to her for life, with remainder to her husband for life, with remainder to the issue of her body. D. having married, it was held that, though she would have taken an estate tail had it been the case of an immediate devise, yet the trust, being executory, was to be executed in a more careful manner; and that a conveyance to D. for life, with remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent (*Lord Glenorchy v. Bosville* (1733), Cas. t. Talb. 3; and see *Trevor v. Trevor* (1720), 1 P. Wms. 622; *Papillon v. Voice* (1728), 2 P. Wms. 471). It was the case of *Lord Glenorchy v. Bosville, supra*, which originated the distinction between executed and executory trusts.

Further, where a strict following of the directions to settle would render the limitations void as contrary to

the rule against perpetuities, the court will so adapt the settlement as to avoid this (see *Humberston v. Humberston* (1716), 1 P. Wms. 332; *Re Russell, Dorell v. Dorell*, [1895] 2 Ch. 698).

As already said, executory trusts usually arise under either wills or marriage articles. In whichever way they arise the interpretation is the same, save that in those that arise under marriage articles there is a presumption in the absence of evidence to the contrary (*Howel v. Howel* (1751), 2 Ves. 358) that it was intended to provide for the issue of the marriage (*Sackville-West v. Holmesdale, supra*). No such presumption arises in the case of executory trusts in wills unless, as frequently happens, the property is directed to be settled only on the marriage of the cestui que trust.

While in the case of an executed trust or of an equitable estate arising under an executed trust or otherwise, it is not absolutely necessary that technical words of limitation should be employed to pass the fee, nevertheless a limitation without such words will be *prima facie* read as would a grant of the legal estate without such words (*In re Whiston's Settlement*, [1894] 1 Ch. 661), and will be held to pass merely a life estate, unless it is clear from the words of the grant that the grantor intended the fee to pass (*In re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752). In the case of an executory trust the court will consider the whole instrument and give the limitation that meaning which seems the one most probably intended by the settlor.

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#### ART. XXVI.—*Completely Constituted Trusts.*

(1) A trust which has been declared is not completely constituted until the trust property is vested in trustees for the benefit of the cestuis que trust.

(2) In trusts declared *inter vivos* the trust property may become vested in trustees either (i) by the settlor constituting himself a trustee of it, or (ii) by his assuring or doing all in his power to assure the trust property to other persons as trustees.

In trusts declared by will the trust property always becomes vested in equity in the trustees from the moment the will comes into operation, *i.e.*, from the death of the settlor.

(3) When the trust property is vested in trustees for the benefit of the cestuis que trust, then, subject to Art. XXVIII., every cestui que trust, whether or not he gave value for the constitution of the trust, is entitled as an equitable owner to have the performance of the trust enforced.

#### PARAGRAPHS (1) AND (2).

The test whether or not a trust is completely constituted is whether or not the settlor has divested himself at law or in equity of the ownership of the trust property. At law there is only one way of doing this, that is, by executing a proper assurance. But in equity he may as effectually divest himself of the ownership by declaring himself a trustee of the property for the cestuis que trust. In order to do this it is not necessary to "use the words 'I declare myself a trustee, but he must do something which is equivalent to it and use expressions which have that meaning, for however anxious the court may be to carry out a man's intentions it is not at liberty to construe words otherwise than according to their proper meaning" (*per JESSEL, M.R.*, in *Richards v. Delbridge* (1874), L. R. 18 Eq. 11; Stra. L. C., p. 60). Thus in *Gee v. Liddell* (1866), 35 Beav. 621, a testator left A. a legacy of £2,000, at the same time authorising his executor B. to

retain it till B.'s death, B. to pay to A. interest at the rate of 4 per cent. B., being satisfied that the testator intended to leave A. £3,000, declared that he would see to it that A. should have the extra £1,000. Later B. signed a memorandum entitled in the will of the testator and stating that B. paid A. £120 each year, "being interest at 4 per cent. on £3,000," and afterwards he signed another memorandum recording his previous declaration. He did in fact pay £120 per annum to A. till his death :—*Held*, that he constituted himself trustee of the additional £1,000.

Formerly, when many things such as policies of insurance, debts, etc., were not alienable at law, equity was often compelled to go further than this, and to hold that where a thing was inalienable at law, if the settlor had done all he could to alienate it this amounted to a transfer in equity. Though this principle is of less importance now than formerly, it is still good law. Thus in *Keke-wich v. Manning* (1852), 1 De G. M. & G. 176, certain residuary property, only transferable in the books of the bank, was left by will to A.'s mother for life and then to A. herself absolutely. A. married in her mother's lifetime. Before her marriage she assigned her reversionary interests in the residuary property upon certain trusts :—*Held* that, as she was not owner in possession and so was not entitled to transfer the property in the books of the bank, she had done all she could to transfer it and so there was in equity a complete assurance of the property comprised in the assignment.

On the other hand, where a settlor could have completely transferred the property if he had chosen, but has failed to do so through not adopting the proper mode of transfer, the court will not perfect the gift either by holding that the property is transferred in equity or that the imperfect gift amounts to a declaration of trust by the settlor in favour of the trustees or cestuis que trust (*Antrobus v. Smith* (1806), 12 Ves. 39; *Milroy v. Lord* (1862), 4 De G. F. & J. 264). Here equity merely follows the law (*Cochrane v. Moore* (1890), 25 Q. B. D. 57).

No questions such as these arise when the trust is declared by will, since a will is both at law and in equity a complete assurance of the property comprised in it.

### PARAGRAPH (3).

Usually the act of the settlor which vests the trust property in trustees is also sufficient to transfer the equitable interest in the trust property to the cestuis que trust. This is always the case where the settlor declares himself trustee, since if the effect of so declaring himself is not to transfer the equitable interest to the cestuis que trust his declaration has no effect whatever and is absolutely nugatory. But sometimes property is effectually vested by a settlor in trustees without any right of enforcement in equity passing to the cestuis que trust. Examples of such cases will be found under Art. XXVIII.

Usually, however, the effect of vesting the property in the trustees is to transfer it in equity to the cestuis que trust. This is the case even where the trust is not for the general benefit of the cestuis que trust but for some particular benefit, such as their education, when, if there is any surplus after the particular benefit is carried out, it belongs to the cestuis que trust (see *In re Andrew's Trust*, *Carter v. Andrew*, [1905] 2 Ch. 48). Wherever this is the case one important result follows. In order that a person to whom a transfer of property is made should take advantage of it, it is not necessary any more in equity than in law that such person should either be a party to the transfer or give any consideration for the property (*Paul v. Paul* (1882), 20 Ch. D. 742). Thus if A. privately and unknown to B. conveys by deed Blackacre to B., on B.'s discovering the conveyance he can eject A. from Blackacre (see *Re McMullan*, *McMullan v. McMullan*, [1901] 1 Ch. 143). In the same way if A. declares himself privately and secretly a trustee of Blackacre in trust for B., B. on learning of the declaration can claim to have Blackacre conveyed to him (*New, Prance, and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19). Again, if A. conveys Blackacre

to B. as a gift without receiving any consideration whatever for it, or gives B. a horse, completing the gift by delivery, B. immediately becomes entitled to Blackacre or to the horse just as fully (as far as A. is concerned) as if he had in each case given A. the full value of the property (see *Cochrane v. Moore* (1890), 25 Q. B. D. 57). The same would be the case if A. had declared a trust of Blackacre or of the horse in favour of B. (see *Keke-wich v. Manning* (1852), 1 De G. M. & G. 176). Hence the rule, as commonly stated, that once a trust is fully constituted it can be enforced against the settlor by any cestui que trust whether he gave or did not give value for the trust. And this rule is absolute unless where the trust can not be enforced by a cestui que trust at all (see Art. XXVIII.).

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### ART. XXVII.—*Incompletely Constituted Trusts.*

(1) When a trust has been declared but the trust property has not been vested in trustees for the benefit of the cestuis que trust, the trust is (as it is said) *in fieri*; that is no trust is actually constituted, but there is merely an agreement to create a trust.

(2) This agreement can not be enforced against the settlor unless :

- (i) the agreement was based on valuable consideration ; and
- (ii) a party to the consideration requires the performance of the agreement.

(3) Parties to the consideration for an agreement to constitute a trust consist of—

- (i) parties who gave valuable consideration other than marriage ;

- (ii) parties who gave marriage consideration, namely (a) the spouses, (b) the issue of the marriage;
- (iii) trustees as representing any of the above.

Cestuis que trust under the declaration of trust who are not parties to the consideration are called *volunteers*.

(4) Where the court on the demand of a party to the consideration compels the settlor to constitute the trust, it will compel him to constitute the *whole* trust—that is, not only those provisions of it for the benefit of parties to the consideration but those provisions also for the benefit of volunteers.

(5) Any trust, the consideration of which is marriage, for the benefit of the wife or children of the settlor, of specific property in which the settlor had no interest whatever at the date of the declaration of the trust, and not being property of or property held by the settlor in right of his wife, is on the settlor's bankruptcy void as against the settlor's trustee in bankruptcy in so far as it is not then completely constituted.

(6) For the purposes of this Article the sealing of an agreement does not in itself make the agreement one based on valuable consideration.

#### PARAGRAPH (1).

Incompletely constituted trusts are in effect contracts or promises to constitute trusts. The most usual examples of them are undertakings in marriage articles to settle certain sums of money or certain land and

covenants in marriage settlements to settle the after-acquired property of the wife—that is, property accruing to her or to her husband in her right after the marriage.

#### PARAGRAPHS (2), (3), AND (4).

An incompletely constituted trust, being simply a promise or contract to constitute a trust, is subject to the ordinary law of simple contract. If A. promises B. to teach C. law, and neither B. nor C. gives consideration for the promise, neither B. nor C. has any legal remedy against A. should he refuse to perform his promise. If B. gave consideration but C. did not, B. would have a remedy but C. would not. If C. also gave value, both B. and C. would have a remedy (*Price v. Easton* (1833), 4 B. & Ad. 433). If, instead of promising to teach C., A. had promised to settle £1,000 on him, the result would be in each case precisely the same. This is the primary distinction both in law and in equity between a conveyance and a contract: that a conveyance confers rights on the grantees whether he has given consideration or not, while a contract (unless under seal) confers rights on the contractee only if he has given consideration. And this is the distinction between a completely and an incompletely constituted trust (*Re Austis. Chetwynd v. Morgan* (1886), 31 Ch. D. 596).

The chief differences between promises to constitute trusts and other contracts are that the former are almost invariably made in consideration of marriage, that they are primarily intended to confer benefits upon the issue of the marriage not yet born, and that, in the event of there being no issue, benefits are intended to be conferred on persons who are strangers to the whole transaction—a more complicated state of things than is ever found in ordinary contracts not based on marriage consideration.

Thus A. and B. by marriage articles agree that B.'s—the wife's—fortune shall be settled on her for life, then on her husband, and on the death of the survivor on the issue of the marriage, and in default of such

issue on C., B.'s daughter by a previous marriage, and if C. should predecease A. and B. and die without issue, then on B.'s sister's children. Now, if in fact no settlement is executed, who is entitled to enforce this agreement?

It is now finally settled that the only persons entitled to do so are A. and B. and the issue of the marriage for whom, as it is said, "the parents purchase." These are all that are within the marriage consideration (*De Mestre v. West*, [1891] A. C. 264; *Attorney-General v. Jacobs-Smith*, [1895] 2 Q. B. 341). Formerly it was thought that C. was also (*Newstead v. Serles* (1737), 1 Atk. 265), but that and a number of other notions of a like kind (see *Clarke v. Wright* (1861), 6 H. & N. 849) are now exploded. Of course, where there are trustees—as where the incompletely constituted trust is a covenant in a settlement to settle after-acquired property—the trustees as representing the parties to the consideration can enforce the agreement too.

Once a party to the consideration applies to the court to enforce the agreement, the court will not enforce it in his favour only. Say, for instance, that in the above example, B. dies without making any settlement and A. applies against her executors to have the marriage articles enforced, the court will not order the executors merely to pay A. the income of B.'s fortune for life; it will order them to settle the fortune in favour of all the beneficiaries under the articles, whether they gave value or are mere volunteers.

#### PARAGRAPH (5).

This provision depends on sect. 47 (2) of the Bankruptcy Act, 1883. One point in regard to it must be noticed. It only applies to specific property (*Ex parte Bishop, Re Tonnies* (1873), L. R. 8 Ch. App. 718). Where the trust or agreement applies simply to a sum of money in no way earmarked, then, in so far as that has not been at the date of the bankruptcy paid to the trustees, the trustees are entitled to prove for it as a debt against the estate of the bankrupt. Moreover,

even when the trust applies to specific property, if the specific property vests in the settlor and he declares himself trustee of it for the persons entitled under the covenant, on his subsequent bankruptcy the trust will be good (*Shrager v. March* (1908), 77 L. J. P. C. 105; and Stra. L. C., pp. 73—76).

#### PARAGRAPH (6).

At common law a deed—that is, an instrument sealed and delivered by the maker—imports consideration. In equity, for the purpose, at any rate, of constituting a trust, it does not (*Jeffries v. Jeffries* (1841), Cr. & Ph. 139). Thus a settlement under seal of property which does not belong to the settlor at the time the settlement is made, and which, therefore, conveys nothing at law and can only be enforced in equity, will not be enforced by the court if, in fact, not based on valuable consideration (*In re Ellenborough, Towny Law v. Burne*, [1903] 1 Ch. 697). The trustees, however, under such a settlement may, if the property is not transferred to them when it vests in the settlor, maintain at law an action for damages for breach of contract (*In re Plumptre's Marriage Settlement, Underhill v. Plumptre*, [1910] 1 Ch. 609).

### ART. XXVIII.—*Trusts of Imperfect Obligation.*

Completely constituted trusts which have not the effect of transferring the equitable interest in the trust property to the cestuis que trust cannot be enforced against the settlor or the trustee. Such trusts may be called *trusts of imperfect obligation*. The most important are:

- (1) Trusts of money voted by Parliament or granted by royal warrant, where the officers charged with executing

the trust are responsible only to the Crown.

- (2) Trusts for the payment of creditors to which the creditors are not parties either actually or by being induced by notice of the trust to delay their demands for payment.
- (3) Trusts for the advancement of purposes, public or private, which are not charitable.

Many lawyers deny that a trust exists unless all the cestuis que trust can enforce it (see Mr. Underhill's definition of a trust, cited *supra*, p. 49). This would exclude from the category of trusts pretty well all incompletely constituted trusts, at any rate, all those where among the cestuis que trust there are any volunteers. It, of course, excludes altogether trusts such as are dealt with under this Article, and this they recognise by calling these *illusory* trusts. I think, on the whole, it is simpler to regard a trust as completely constituted when the property is vested in trustees, and where none of the cestuis que trust can enforce it to call it, by analogy to contracts of the same kind, a trust of imperfect obligation (see Pollock on Contracts).

These trusts are altogether different from transactions such as that in *Re Pitt-Rivers, Scott v. Pitt-Rivers*, [1902] 1 Ch. 403. There a testator who had maintained a museum and pleasure-ground to which he admitted the public, but over which he never gave them any legal rights, devised the same to his son and also an annuity of £300 a year to maintain them. It was shown by evidence that the testator intended, and the son undertook, to keep up the museum and gardens and admit the public as the testator had done, but that the testator had no intention to confer any legal right on the public to admission:—*Held*, on this, that no trust was created. The father obviously intended to rely on the honour of his son. But

in the present cases it is intended to impose a legal obligation on the person to whom the trust property is transferred. He is intended to be a trustee in every way, and subject to all the duties of a trustee. The only difference between him and an ordinary trustee is that the law gives the *cestuis que* trust no mode of enforcing his obligations.

#### PARAGRAPH (1).

Thus, votes of funds by Parliament for pensions to former servants (*Grenville-Murray v. Earl of Clarendon* (1869), L. R. 9 Eq. 11), or grants of prize-money by royal charter to be distributed among the persons entitled (*Kinloch v. Secretary of State for India* (1880), 15 Ch. D. 1), give no right of action to the persons intended to be benefited.

#### PARAGRAPH (2).

Trusts for the payment of creditors only bind the settlor in so far as the creditors are parties or “hold their hands” because of notice of the trusts (*Johns v. James* (1878), 8 Ch. D. 744; Stra. L. C., p. 87). Thus in *Re Sanders’ Trust* (1878), 47 L. J. Ch. 667, A. made a trust deed for the benefit of his creditors generally. Information of this deed was conveyed to some creditors, who in consequence took no steps to recover their debts. It was not communicated to others:—*Held*, that the trust was irrevocable as regards the first, but revocable as regards the second class. Where, however, the trust is for the benefit of some only of the settlor’s creditors, it may be held that it was intended to benefit them, and so be irrevocable (*New, Prance, and Garrard’s Trustee v. Hunting*, [1897] 2 Q. B. 19). And if, after the trust for the payment of creditors there is a trust of any residue left in favour of a person who is not a creditor, then, as the settlor cannot, without revoking the trust for the latter, revoke the trust in favour of creditors, he is bound by it (*Godfrey v. Poole* (1888), 13 App. Cas. 497; and see *Smith v. Cooke*, [1891] A. C. 297).

## PARAGRAPH (3).

Trusts not for persons but for purposes not charitable, are perfectly legal provided the purpose itself is legal, and that the fund given for the advancement of the purpose is not to be so devoted for a longer time than is permitted by the rule against perpetuities (*Pirbright v. Sulwey*, W. N. (1896) 86). Thus trusts for the purpose of erecting a monument to the settlor (*Mitford v. Reynolds* (1848), 16 Sim. 105), for the support of dogs or horses (*Re Dean, Cooper-Dean v. Stevens* (1889), 41 Ch. D. 552; Stra. L. C., p. 92), for the promotion of yachting (*Re Nottage*, [1895] 2 Ch. 649), or for the maintenance of the settlor's tomb in a churchyard (*Pirbright v. Salwey, supra*), are quite valid trusts provided they do not tend to perpetuities. In the words of NORTH, J., in *Re Dean, Cooper-Dean v. Stevens (supra)*, at p. 537, such a trust is a perfectly good trust, although it is difficult to see who can ask the court to enforce it. In that case an annuity of £750 was left by a testator to his trustees for the purpose of maintaining his horses. It was held that it was not void, but that the residue left after providing for the maintenance of the horses lapsed. Owing to the difficulty of enforcing trusts of this kind, it is now usual to carry out such purposes by making the gift of the fund subject to a gift over in case the purpose is not carried out (*Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252. And see Stra. Convey., p. 289).

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ART. XXIX.—*Void and Voidable Trusts.*

Equity follows the law as to legal assurances; and therefore, where a legal assurance would be liable to fail or to be set aside on the ground that it was (i) made for an unlawful purpose or a purpose contrary to the policy of the law, (ii) intended to delay or defeat creditors within 13 Eliz. c. 5, (iii) induced by fraud, coercion, or undue influence, or (iv) void under the

Bankruptcy Act, 1883, an assurance by way of trust will also be liable to fail or to be set aside.

It is not proposed here to discuss the question when a trust is void or voidable. A trust is void just where a conveyance would under the same circumstances be void. And when it is void under (i) or (iii) there is a resulting trust to the settlor; when under (ii) to the creditors and when under (iv) to the trustee in bankruptcy. A short summary of the law will be found in the notes to Art. CXIII.

It is enough to say that where several trusts arise under the same instrument the fact that one or more of these is void or voidable will not affect the others if these are clearly severable from the void trust. Thus, one of the commonest examples of an unlawful trust is a trust for the illegitimate children which the settlor's mistress has or may have. Now the trust in favour of the unborn children is bad as conducing to immorality. But there is no such objection to the trust in favour of the children already born, and it will be held good (*Re Harrison, Harrison v. Higson*, [1893] 1 Ch. 561).

Perhaps it should be added that in a recent case a distinction between trusts and conveyances for immoral consideration was taken. In *Phillips v. Probyn*, [1899] 1 Ch. 811, it was held that while a settlor could not get such a settlement set aside, because he could not plead his own turpitude, the trustees, who were in no such position, could ask the court whether the settlement was good, and the court, knowing the consideration was immoral, must set it aside. This seems contrary to all principle. It is in effect to permit trustees to set up the *jus tertii* against their cestui que trust, which they certainly were never supposed to be entitled to do.

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**ART. XXX.—*What Property may be the Subject-Matter of a Trust.***

Any property, except property which is assignable neither at law nor in equity, may be made the subject-matter of an express trust.

Property not assignable at law or in equity consists of—

- (1) Property to which a married woman is entitled for her separate use without power of anticipation.
- (2) Property not assignable by the policy of the law.
- (3) Property expressly rendered unassignable by Act of Parliament.

It has already been noted that all equitable interests are, and always were, assignable, whether the property in which they subsist is or is not assignable at law, except equitable interests vested in married women and subject to a restraint on alienation (see Art. CXLVII.). But in some cases where the law forbade alienation, equity forbade it too, and it did so by refusing to allow equitable interests to be created in such property. These cases are summed up in paragraphs (2) and (3) of the Article. As an example of property not assignable by the policy of the law, pensions granted for the purpose of keeping an officer fit for further service to the Crown may be given. Properties provided by Parliament for services to the Crown and for the support of honours conferred for such services (such as the Blenheim Estates) are usually made inalienable by the Act settling them.

A.—PRIVATE TRUSTS (*continued*).

## CHAPTER II.

TRUSTEES: THEIR KINDS, APPOINTMENT,  
RETIREMENT, AND ESTATE.

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ART. XXXI.—*Ordinary and Statutory Trustees.*

(1) Trustees are now primarily divisible into *ordinary* and *statutory* trustees.

(2) Statutory trustees consist of *judicial* trustees appointed under the Judicial Trustees Act, 1896, and the *public* trustee appointed under the Public Trustee Act, 1906.

(3) The public trustee is qualified to act either as an ordinary or a judicial trustee.

## PARAGRAPH (1).

Before the Judicial Trustees Act, 1896, all trustees were ordinary trustees. If the court wished to interfere

with the administration of a trust it had to do so by taking the administration into its own hands. Until the Judicature Acts, indeed, it was only by an administrative action that the trustees were able to obtain its directions as to how they should proceed in cases of difficulty. Now a mode of obtaining this without administration has been provided (see Art. LIX.). Moreover, as there was no other mode of controlling the action of the trustees, any one interested in the trust property was entitled to claim administration (*Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34 ; Stra. L. C., p. 11). That, too, is now altered.

Since the Public Trustee Act, 1906, ordinary trustees are themselves now divisible into *ordinary*, *managing*, and *custodian* trustees, just as they are divisible, according as powers are or are not conferred upon them, into *active* and *passive* trustees. It is, however, convenient to postpone the consideration of the different kinds of ordinary trustees until we come to discuss the causes that give rise to the differences.

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#### ART. XXXII.—*Ordinary Trustees : their Appointment.*

(1) Trustees are in the first instance almost invariably appointed by the settlor under the instrument constituting the trust, but, where necessary, they may be appointed by the court. Such trustees are called *original* trustees.

(2) Where it is desired to appoint new trustees in substitution for or in succession to original or other trustees, such appointment may be made—

- (i) By all the *cestuis que* trust where these are *sui juris* and absolutely entitled.

- (ii) By the person (if any) who is by the trust instrument nominated to appoint new trustees ; or
- (iii) If no such person is so nominated, or the person so nominated is unable or unwilling to act, by the persons having power under sect. 10 of the Trustee Act, 1893, to appoint new trustees where such power is not expressly excluded by the terms of the trust instrument ; or,
- (iv) Where it is found inexpedient, difficult, or impracticable to appoint new trustees otherwise, by the High Court under the powers conferred upon it by sect. 25 of the Trustee Act, 1893, or where the trustee is a lunatic by the Court in Lunacy under sect. 141 of the Lunacy Act, 1890.
- (v) Where the person having the power to appoint new trustees is a lunatic, under the power given to the Court in Lunacy by sect. 129 of the Lunacy Act, 1890.

(3) The persons having power under sect. 10 of the Trustee Act, 1893, to appoint new trustees are the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving trustee.

Subject to the terms of the trust instrument, these persons or the person (if any) nominated by the trust instrument to appoint new trustees are entitled to appoint a new trustee in substi-

tution for or in succession to another trustee only when the latter—

- (i) is dead ; or
- (ii) remains out of the United Kingdom for more than twelve months ; or
- (iii) desires to be discharged from the trust ; or
- (iv) refuses or is unfit to act, or is incapable of acting in the trust.

(4) The powers conferred by sect. 25 of the Trustee Act, 1893, upon the High Court may be exercised by the court whenever it considers that it is expedient to do so. It will in general consider it expedient to do so where the circumstances are such as would entitle a person possessing the statutory power to appoint new trustees under sect. 10 to exercise that power, or more particularly where an existing trustee has been convicted of felony or is a bankrupt.

(5) On the appointment of a new trustee the number of trustees may be increased, separate sets of trustees may be appointed to separate parts of the trust property subject to distinct trusts, and the number of trustees may be diminished to two where originally more than two were appointed. But a retiring trustee cannot be discharged unless there are at least two trustees left to perform the trust, except where only one was originally appointed.

## PARAGRAPHS (1) AND (2).

Where all the cestuis que trust are *sui juris* and absolutely entitled, they are full owners of the trust property in equity and the trustees must obey their directions (see *infra*, Art. LXIII.). Accordingly if they appoint new trustees the old trustees must convey the trust property to these on their direction.

Section 10 of the Trustee Act, 1893, is a re-enactment of sect. 31 of the Conveyancing Act, 1881. Concurrently with the power to appoint new trustees given to the Court of Chancery by sect. 25 of the Trustee Act, 1893, the Court in Lunacy has, under sect. 129 of the Lunacy Act, 1890, power, where the donee of the power to appoint is lawfully detained as a lunatic, to nominate another person to appoint in his stead, and to make an order vesting the property in the new trustees when appointed (*Re Fuller*, [1900] 2 Ch. 551). There is no power, however, under the Trustee Act, 1893, or the Lunacy Act, 1890, enabling the court to appoint a new trustee in place of a trustee who is a *criminal* lunatic. Such an appointment may be made under sect. 5 of the Trustee Act, 1850 (*In re R.*, [1906] 1 Ch. 730).

The power of the High Court extends to appointing original trustees where from any cause none have been effectively appointed by the settlor, or all those appointed disclaim (*Re Williams* (1887), 36 Ch. D. 231). But though the court may appoint original trustees, it cannot reappoint the old trustees as new trustees (*Re Martin's Trust*, W. N. (1886) 183).

Though the court is not entitled under sect. 25 to discharge trustees unless at least two remain, yet under its general jurisdiction the court may in an action for the administration of a trust discharge all the trustees without appointing any new ones in their place (*Re Chetwynd's Settlement, Scarisbrick v. Nevinson*, [1902] 1 Ch. 692).

Where the donee of the power to appoint new trustees is a beneficiary under the trust the power is personal, and remains in him after he has alienated his interest

(*Hardaker v. Moorhouse* (1884), 26 Ch. D. 417). He is not, however—any more than the person having the statutory power—under a legal obligation to exercise his power (*Re Sarah Knight's Will* (1883), 26 Ch. D. 82). If, however, he, or the person having the statutory power, is willing and able to appoint, the court has no jurisdiction to override this power by itself appointing (*Re Higginbottom*, [1892] 2 Ch. 132). But where it is desirable the court will appoint, as where for instance, the last trustee has been guilty of a breach of trust (*Re Pilling's Trusts* (1883), 27 Sol. J. 199), or where joint donees of the power cannot agree (*Re Tempest* (1866), L. R. 1 Ch. 485), or where there is doubt as to who is entitled to exercise the express or statutory power (*Re Woodgate* (1857), 5 W. R. 448), or where a vesting order is desirable. In such cases the existence of an express or statutory power to appoint will not exclude the court's jurisdiction.

### PARAGRAPH (3).

A last surviving trustee is not entitled to appoint new trustees by his will (*Re Parker's Trusts*, [1894] 1 Ch. 707). On his death, as we shall see (Art. XXXVIII.), the trustee's estate descends to his personal representatives who are themselves trustees of the property until new trustees are appointed. The personal representatives may, subject to any express power given to other persons by the trust instrument, themselves appoint new trustees (*In re Ingleby & Co.* (1883), 13 L. R. Ir. 326, and see *infra*, Art. XLI.).

The powers of appointing new trustees in substitution for the existing trustees, whether such powers are express or statutory, are somewhat strictly construed (see *Re Walker*, [1901] 1 Ch. 259).

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ART. XXXIII.—*Ordinary Trustees: who may be appointed.*

(1) Any person (including a corporation) is competent to be a trustee of any property which at law or in equity he is competent to hold.

(2) A settlor is entitled to appoint any competent person a trustee, but a person nominated by the trust instrument, or entitled under sect. 10 of the Trustee Act, 1893, to appoint new trustees should not appoint, as a rule, himself, though competent, or any other person, though competent, whom the court would not appoint.

(3) The court will not appoint (1) a person under disability; (2) a person not resident within the jurisdiction of the court; (3) a cestui que trust or the husband of a cestui que trust; (4) or any person who has been guilty of conduct which under the preceding Article would justify his removal from the position of trustee.

(4) A married woman is not a person under disability for the purposes of this Article, and is as competent to be a trustee as a feme sole, though, as a rule, the court is disinclined to appoint her.

PARAGRAPH (2).

Formerly it was generally thought that the donee of a power to appoint new trustees *could* not appoint himself (*Skeats v. Evans* (1889), 42 Ch. D. 522). It has now

been decided that this is not the law. It is, as a rule, most undesirable that the donee should appoint himself, but in a proper case the donee, under an express power, at any rate, is entitled to do so, and the court will approve the appointment (*Montefiore v. Guedalla*, [1903] 2 Ch. 723). But it has been held, on somewhat unsatisfactory grounds, that the person entitled to appoint under sect. 10 of the Trustee Act, 1893, is not within this rule (*In re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435).

Though the donee (express or statutory) of a power to appoint new trustees may lawfully appoint a person whom the court would not appoint, it is very injudicious for him to do so. If it is found necessary for the court afterwards to remove such person, the donee may be made liable for the costs (see *Raikes v. Raikes* (1866), 35 Beav. 403), and it is submitted that, if the appointment is flagrantly improper and the person appointed commits a breach of trust, the donee may himself be held liable for such breach (see and consider *Re Earl of Lichfield* (1737), 1 Atk. 87).

Since the Bodies Corporate (Joint Tenancy) Act, 1899, a corporation may be appointed a co-trustee with an individual (*Re Thompson's Settlement*, [1905] 1 Ch. 229). Now under sect. 4 of the Public Trustee Act, 1906, a bank or insurance company or other body corporate may be appointed a custodian trustee (see *infra*, Art. XL.).

#### PARAGRAPH (4).

Formerly a married woman was not entitled to become a trustee without her husband's consent. This was because she had no common law capacity to hold property independently of her husband, who was, moreover, responsible for her acts as trustee. This has now been altered by the Married Women's Property Act, 1882. But owing to the difficulties which might arise as to a married woman's power to convey the trust property without her husband joining in the conveyance (which, however, have now been removed by the Married Women's Property Act, 1907, sect. 1), and as to the remedy against her for breach of trust (see *Re Turnbull*,

[1900] 1 Ch. 180), she has not been hitherto considered a desirable trustee.

The courts also were formerly reluctant to appoint a feme sole—that is, a woman without a husband—to be a trustee. Where, however, she is shown to be competent from a business point of view to discharge the trust, she is now just as eligible as a man (see *Re Dickinson's Trusts*, [1902] W. N. 104).

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#### ART. XXXIV.—*Ordinary Trustees: Disclaimer of Trust.*

(1) Any person, even though he may have agreed before appointment to act as trustee, may after appointment (but not after acting in the trust) disclaim the trust and trust property.

(2) A man or feme sole may disclaim expressly by deed or impliedly by refusing in language or by conduct to act as trustee. A married woman must disclaim by deed.

(3) If a person appointed trustee does not disclaim expressly or impliedly within a reasonable time, the court may hold that he has accepted the trust.

(4) A person appointed trustee must disclaim or accept the whole trusts and trust property.

##### PARAGRAPH (1).

A person who has promised to become trustee may disclaim after the trust is created if he received no con-

sideration for his promise. Where a trustee does disclaim, if he is sole trustee, and the settlor is living, the trust property remains vested in the settlor, who is himself trustee of it for the purposes of the trust until new trustees are appointed (*Mallott v. Wilson*, [1903] 2 Ch. 494). Where the trustee is appointed by will, and by the same will the trust property is devised or bequeathed to the trustee, if the trustee disclaims the trust he takes no interest under the will in the trust property (*Re Birchall, Birchall v. Birchall* (1889), 40 Ch. D. 436).

#### PARAGRAPH (2).

The usual mode of disclaiming is by deed. But in the case of a man and feme sole either an oral refusal or a refusal by conduct—such as by purchasing some of the trust property from the person in whom it would vest in case of disclaimer by the trustee (*Stacey v. Elph* (1832), 1 M. & K. 199)—is equally effective though not equally expedient. Section 7 of the Real Property Act, 1845, enabled a married woman to disclaim an estate of any tenure by deed. Query, whether since the Married Women's Property Act, 1882, she cannot disclaim as if she were a feme sole.

#### PARAGRAPH (4).

Thus in *Lord and Fullerton's Contract*, [1896] 1 Ch. 228, a testator declared trusts of real and personal property, some of which was in England and some abroad. One trustee accepted the trust as to the foreign property, and the other as to the English property. On a sale of the English property by the latter:—*Held*, that the trustee who accepted as to the foreign property was also a trustee of the English property and must join in the sale.

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**ART. XXXV.—*Ordinary Trustees: their Retirement.***

Once a trustee has accepted the trust he cannot voluntarily retire or be compulsorily removed except—

- (i) by the lawful exercise of the powers as to the appointment of new trustees referred to in Art. XXXII.; or
- (ii) by the order of the court under its general jurisdiction over the execution of trusts.

Under its general jurisdiction the court can, at any time during an action for the administration of the trust property, remove a trustee (*In re Wrightson*, [1908] 1 Ch. 789; Stra. L. C., p. 175). It will do this as a rule, only on one or other of three grounds: (i) want of honesty; (ii) want of reasonable capacity; (iii) want of reasonable fidelity (*ibid.*).

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**ART. XXXVI.—*Ordinary Trustees: Vesting Trust Property.***

Upon the appointment of new trustees, or on the retiring of an existing trustee, the trust property may be vested in the new trustees, or in them jointly with any continuing trustees, or in the continuing trustees:

- (1) By an ordinary assurance executed by the former trustees; or,

- (2) By a vesting declaration in the deed appointing a new trustee, or discharging a retiring trustee, made by the person appointing the new trustee, or by the retiring trustee and continuing trustee and the person entitled to appoint new trustees, provided the trust property is not (i) the legal estate in copyhold land, or (ii) land conveyed by way of mortgage to secure trust money, or (iii) any share, stock, annuity, or property transferable only in the books of a company or other body, or in manner prescribed by Act of Parliament; or,
- (3) Where it is difficult or impossible to obtain a transfer of the trust property in either of these modes, by vesting order of the High Court, vesting the trust property transferable by ordinary assurance in the new or in the new and continuing trustees, and giving them the right to call for a transfer or an admittance as to trust property transferable only in the books of a company or other body, or in the rolls of a manor. Alternatively, the vesting order of the court may appoint a person to convey the property.
- (4) Where a lunatic is trustee, solely or jointly with another person or persons, of land or of any stock or chose in action, the property may be vested by vesting order of the Court in Lunacy transferring such property or the right to call for a transfer of such property, or

to claim the dividends on it or sue for the chose in action.

The above Article is a summary of sect. 12 (being a re-enactment of sect. 34 of the Conveyancing Act, 1881), sects. 26, 33, 34, 35 and 36 of the Trustee Act, 1893, and sects. 135, 136 of the Lunacy Act, 1890.

A vesting *declaration* was introduced for the purpose of facilitating the transfer of the trust property to the new trustees where it is impossible to obtain an assurance of it from the old or retiring trustees, and where it is desirable to avoid the expense of a vesting *order*. Vesting *orders* are still frequently found necessary. For an example see *Re General Accident Assurance Corporation, Limited*, [1904] 1 Ch. 147. A fully paid vendor is a trustee within sect. 25 of the Trustee Act, 1893 (*In re Ruthren's Trust*, [1906] 1 I. R. 236), and a vesting order may be made where the trustees in whom the property is to be vested have already been appointed (*In re Kenny's Trusts*, [1906] 1 I. R. 531).

Where the existing trustee is a criminal lunatic the court has no power under either sect. 25 of the Trustee Act or sect. 141 of the Lunacy Act to make a vesting order as to property held in trust by him. It may, however, make such an order under sect. 5 of the Trustee Act, 1850, the jurisdiction conferred by which is preserved by sect. 342 of the Lunacy Act, 1890, which repeals it.

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#### ART. XXXVII.—*Ordinary Trustees : Estate taken.*

(1) A trust is said to be a *simple* or *passive* trust when the duties of the trustee are left to be defined by the general law ; it is said to be a *special* or *active* trust when express duties or powers are imposed or conferred upon the trustee by the trust instrument.

(2) Where the trust is a simple trust, and the trust property is freehold land, then :

- (i) Where the conveyance of the trust property to the persons appointed trustees is by deed of grant, such persons will take no estate in the land unless it is limited in the deed not merely unto them but also to their use ;
- (ii) Where the conveyance is by will they will take no estate unless the land is so limited, or unless from the terms of the will it is clear that the testator intended the land to vest in them.

(3) Where the trust is a special trust, then, though the trust property is freehold land, and though it is not limited to the use of the trustees :

- (i) Where the conveyance is by deed of grant the trustees will take an estate in the land of the same extent as the words of the deed would operate to convey to a purchaser for value ;
- (ii) Where the conveyance is by will, the trustees will take only an estate *pur autre vie* in the land if such estate is sufficient to enable them to perform the special duties of the trust ; but if such an estate may not be sufficient for such purposes, then they will take the fee simple whether the land is limited by the will to them or to them and their heirs.

## PARAGRAPH (2).

The Statute of Uses, 1535, has the effect of transferring the legal estate in land to the person to whose use or in trust for whom it is conveyed. But the operation of the statute is confined to conveyances of freehold lands upon passive uses or trusts (see Stra. Conveyancing, pp. 9 *et seq.*). Where the estate conveyed is freehold, and the trust upon which it is conveyed is passive, then the statute imperatively applies, provided the assurance is *inter vivos*. Where, however, it is by will, the statute only applies where it seems that it was the intention of the testator that it should apply, but the court will assume that it was intended that it should apply where the limitations are expressed as they would be in a deed (*ibid.*, p. 264, and see *Doe v. Field* (1831), 2 B. & A. 564 ; and *cf. Houston v. Hughes* (1827), 6 B. & C. 403, and *Re Townsend's Contract*, [1895] 1 Ch. 716).

Where the trust property assured to the trustees is merely equitable freehold in land, then the statute no more applies—whether the assurance is by will or deed—than it does when the trust property is leasehold or pure personality.

It is to be remembered that, whether the Statute of Uses operates or not, the cestui que trust can never take a greater estate in the land than that limited to the trustees (*In re Oliver's Settlement*, [1905] 1 Ch. 191).

## PARAGRAPH (3).

The rule as to wills stated in the Article is based on sects. 30 and 31 of the Wills Act, 1837. The reader will find these sections discussed at some length in Under. and Stra. Inter. Wills, pp. 243 *et seq.* Here all that is necessary is an example or two to illustrate the meaning of the Article.

Suppose A. by deed conveys Blackacre to B. and his heirs in trust to receive the income, and, after discharging

all expenses and outgoings, to pay the net income to C. for life, and upon C.'s death to hold Blackaere in trust for D. and his heirs. Now, here the trust in favour of C. is a special trust, and that in favour of D. a simple trust. The existence of the special trust, however, prevents the Statute of Uses from operating, and accordingly the whole legal fee vests in B. If, however, the assurance had been by will, then, as an estate for the life of C. would be all B. needed in order to perform the special trust, that is all he would take, and the limitation over to D. would carry both the equitable and the legal estate in Blackaere (*Blagrave v. Blagrave* (1849), 4 Ex. 550).

On the other hand, if it is not clear on the face of the will that an estate *pur autre vie* will be sufficient to enable the trustee to perform the special trust, he will take the fee simple, whether it is expressly limited to him or not. Thus, if A. by will devises Blackaere to B. in trust for C. for life for her own separate use, and on C.'s death to her children in fee simple, and in default of children in trust for D. for her separate use, and on D.'s death to her children in fee simple, here B. will take the fee simple, because an estate *pur autre vie*, though sufficient to enable him to perform the special trust for C.'s separate use, would not enable him to perform the special trust for D.'s separate use should it ever require performance (*Harton v. Harton* (1798), 7 T. R. 652; *Van Grutten v. Foewell*, [1897] A. C. 658). Special trusts which arise in this way from time to time are called *recurring trusts*.

The importance of this rule as to the estate taken by the trustees lies chiefly in this, that the rule in *Shelley's Case* (1579), 1 Rep. 88a, applies only if all the limitations are legal or all are equitable. Thus, in the example last given, if there had been no recurring special trust, the trustee would have taken only an estate for C.'s life in Blackaere; C.'s interest would then have been equitable, while the limitation to the heirs of her body would have been legal. Accordingly C. would have taken only an estate for life with a legal contingent remainder for whoever might be the heir of her body.

But the recurring special trust, as it vested the legal fee simple in the trustee, made all the limitations to the cestuis que trust equitable. Accordingly C. takes not an equitable life estate, but an equitable fee tail, which she can bar and so put an end to the recurring trust in favour of D. (*Van Grutten v. Foewell, supra*).

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#### ART. XXXVIII.—*Ordinary Trustees: Devolution of Estate.*

(1) Trust property is always vested in the trustees, where there are more than one, as joint tenants. Therefore, on the death of one of them the whole of it remains vested in the other or others surviving. On the death of the last surviving, the trust property, whether it is personalty or realty (provided, where it is realty, it is not legal copyhold), and whether or not the last surviving trustee attempts to devise or bequeath it, devolves upon his personal representatives.

(2) The right of admittance to a legal estate of copyhold will, on the death of the last surviving trustee, devolve, if he died testate, on his devisee; if he died intestate, on his customary heir.

Formerly the trust estates of a sole trustee devolved on his death precisely as if they were his own absolutely. If he left no heirs they were even, it seems, liable to escheat. This liability was abolished by sect. 46 of the Trustee Act, 1850. And now, by sect. 30 of the Conveyancing Act, 1881, they devolve whatever their nature on his personal representatives, provided they are not legal copyhold (Copyhold Act, 1894, sect. 88). If they consist of equitable interests in copyhold, they, like legal

freeholds, devolve under sect. 30 (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583).

It was formerly the custom for a sole trustee to devise his trust estates to trustees to hold them until new trustees were duly appointed. Whether it is possible to do this in effect by appointing separate executors for the trust estates is doubtful (see *Re Cohen's Trusts*, [1902] 1 Ch. 187).

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### ART. XXXIX.—*Judicial Trustees.*

(1) By the Judicial Trustees Act, 1896, the court, on the application of the settlor, or a trustee or beneficiary, may appoint a judicial trustee as sole trustee, or in addition to or in substitution for any other trustee or trustees.

(2) Such trustee is an officer of the court, and if the court is not satisfied to appoint the person nominated by the party applying for the appointment, it may appoint the official solicitor of the court, the public trustee, or any private person.

(3) The judicial trustee's duties, rights, and liabilities are the same as those of an ordinary trustee, subject to these qualifications :

- (i) The court may assign him remuneration ;
- (ii) If he is not the official solicitor or public trustee he must give security ;
- (iii) He must every year submit his accounts for audit by an officer of the court or a professional accountant appointed by the court ;

- (iv) He must obey any direction given by the court as to inquiries to be made into, and as to the mode of conducting, the administration of the trust.

The administration of the Judicial Trustees Act, 1896, is now regulated by the Rules of 1897 made in pursuance of the Act. See Yearly Supreme Court Practice, 1913.

#### PARAGRAPHS (1) AND (2).

The discretion of the court to appoint or refuse to appoint a judicial trustee is absolute, and is in no way limited by any power to appoint new trustees vested in the applicant or any one else (*Re Ratcliffe*, [1898] 2 Ch. 352). And if the court is dissatisfied with the person nominated by the applicant, its choice is not confined to the official solicitor ; it may, if it thinks fit, appoint a person proposed by the retiring trustee (*Douglas v. Bolam*, [1900] 2 Ch. 749), or it may appoint the public trustee (Public Trustee Act, 1906, sect. 2).

Though the court has power to appoint a judicial trustee to act in conjunction with an ordinary trustee, it will not, except under special circumstances, do so (*Re Martin*, [1900] W. N. 129).

#### ART. XL.—*The Public Trustee.*

- (1) The public trustee is a corporation sole with an official seal created by the State. The State holds itself responsible for any loss of trust property committed to him due to his breaches of trust. He is charged especially to act as trustee of small estates, but is competent to act solely or jointly with other trustees as trustee of any estate except (i) business estates or (ii) insolvent estates, or (iii) estates held

upon charitable trusts. He may decline to act as trustee of any estate on any ground except the smallness of the estate, or he may prescribe the terms on which he will act (sects. 1, 2, and 7).

(2) By "small estates" are meant estates the capital value of which does not exceed £1,000. On the application of any person of small means, interested in such an estate, who, in the public trustee's opinion, would be entitled to an administration order, the public trustee may declare in writing signed and sealed by him that he takes over the administration of the estate, and thereupon it will vest in him as far as vesting orders under the Trustee Act could transfer it; subject to this, that (i) he cannot exercise the right of transferring stock without the consent of the court; (ii) as regards copyhold he has the right given by sect. 33 of the Trustee Act, 1893, to a person appointed by the court to convey (sect. 3 (1) and (2)).

(3) Where an estate is being administered in any court, and, because of its smallness or for any other reason, it seems expedient to the court that the public trustee should administer it, the court may order this; and the effect of such order will be the same as if the public trustee had made a declaration as described in the preceding paragraph (sect. 3 (5)).

(4) The public trustee may be appointed by the person creating the trust or by the person or court entitled to appoint new trustees, as *custodian* trustee of the trust property along with ordinary trustees. When so appointed

the trust property will be transferred to him as if he were sole trustee; he will have custody of the trust securities, the ordinary trustees having right of sufficient access to them; and all payments of trust moneys will be made to and by him, save that he may in his discretion permit the income to be received by the other trustees, and he may act upon statements of fact made by them. After his appointment the other trustees (who are then called the *managing* trustees) will retain all the rights and powers conferred upon them by the trust instrument (including, if that is exercisable by them, the power to appoint new trustees); but he must concur with them in all acts necessary to discharge their office. The managing trustees will alone count in the computation of the number of trustees required by the Trustee Act, 1893. On the application of (i) himself, (ii) any managing trustee, or (iii) any beneficiary, and on proof that it is the general desire of the beneficiaries, or is otherwise expedient, the court may terminate the custodian trusteeship and make such consequential vesting orders as may be necessary or expedient (sect. 4).

(5) The public trustee may be appointed in the same way (unless the trust instrument forbids it) as an ordinary trustee, when his powers and duties will be the same as if he were a private person so appointed: Provided, however, that on his appointment he may be appointed sole trustee, and the other trustees may then retire, even where originally there were two or more trustees appointed. Where the persons entitled to appoint new trustees propose to appoint the public trustee, they

should, as far as practicable, give notice of their intention to all beneficiaries in the United Kingdom, who may within twenty-one days apply to the court to forbid his appointment, and the court, if it thinks fit, may forbid it (sect. 5).

(6) The public trustee has power (i) to employ agents like ordinary trustees, (ii) to act in legal proceedings by his officers, and (iii) to charge fees for his services as trustee; and any person aggrieved by any act or omission of his in relation to the trust may apply to the court, which may make such order as it thinks just (sects. 9, 10, and 11).

(7) Any beneficiary may obtain an audit of the public trustee's accounts, but not within twelve months after a previous audit; and the entry of the public trustee as owner of stock in the books of a company, is no notice to the company of the trust (sects. 11 and 13).

The above Article is a summary of those sections of the Public Trustee Act, 1906, which refer especially to trusts. Others will have to be referred to in connection with the administration of assets.

Rules have been made under the Public Trustee Act, 1906, which deal primarily with the mode in which he is to carry out his duties (Rules of 1912), and the fees which he is entitled to charge for the services of his office (Rules (Fees) of 1912). It is not necessary here to go to any considerable extent into these. It may be noted, however, that prohibition against the public trustee taking over the administration of a trust involving the carrying on of a business is modified to this extent: (a) that he may become a custodian trustee of such a trust where he is of opinion no risk is involved, and he is not asked to take over securities involving probable

liabilities ; and (b) that he may be an ordinary trustee of such a trust provided (i) the business is to be carried on not for longer than eighteen months, (ii) with a view of selling or winding up the business, and (iii) he is satisfied he can carry it on without risk. The fees chargeable in ordinary cases on taking over the trust estate are 15*s.* per cent. on the first £1,000 of its capital ; 5*s.* per cent. on the rest of the capital value up to £20,000 ; 2*s. 6d.* per cent. on the value between £20,000 and £50,000 ; and 1*s. 3d.* per cent. on the value over £50,000. Then on the income from the trust property fees are payable at the rate of £2 per cent. per annum upon the first £500 ; of £1 per cent. on the balance up to £2,000 ; and of 10*s.* per cent. on the remaining income exceeding that sum.

It may be noted that while the public trustee is made a corporation sole no express power is given him to hold either realty or personality. A licence had to be granted to him by the Crown to hold land in order to prevent its forfeiture under the Mortmain and Charitable Uses Act, 1888 (see *infra*, Art. LXXIX.). At common law a corporation sole has no power to hold goods, which power can only be conferred on him by Act of Parliament. Since the whole Act would have proved abortive if the public trustee had no power to hold personality, the court felt compelled to decide that it must be taken to be conferred impliedly on him by the Act (*In re Leslie's Hassop Estates*, [1911] 1 Ch. 611).

It was held in *In re Devereux, Toorey v. Public Trustee*, [1911] 2 Ch. 545, that whether an estate is a small estate within the Act depends not on the value of the estate when the trust arose, but upon its value at the time the public trustee decides to take over its administration. In that case the testator's estate was at his death over £1,000 in value ; but when the public trustee intervened it had been reduced by payments made by the executors to a sum of about £500 ; and it was held that consequently the public trustee could take it over by writing under his hand and seal.

In *In re Oddy*, [1911] 1 Ch. 532, at p. 537, it was pointed out that once the public trustee has taken an

estate over, any one interested in the estate, however slightly, is entitled, under sect. 13, as of right to call on him for an audit of the whole estate subject to no limitation except that one has not been actually made during the previous twelve months. To meet this difficulty it is now provided by the Rules of 1912, that when an audit is applied for the public trustee may demand a deposit of money to cover the expense of the audit, and also may limit the extent of such audit as he thinks proper, which is very sensible but altogether contrary to the Act.

The public trustee acts in a judicial capacity in giving his decisions on matters arising in the administration of the trust, and there lies an appeal from such decisions to the court (*In re Oddy, supra*). He is entitled to apply, without commencing litigation, for the informal advice of a judge, JOYCE, J., being the judge specially selected for this purpose. The judge, when so consulted, can, if he thinks proper, hear the persons interested in the trust. And the public trustee may be appointed sole trustee under a settlement, even though the trust instrument contains a clause directing that the minimum number of trustees under it shall never be less than two or three (*In re Leslie's Hassop Estates*, [1911] 1 Ch. 611).

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A.—PRIVATE TRUSTS (*continued*).

## CHAPTER III.

TRUSTEES : THEIR DUTIES, POWERS, AND  
PRIVILEGES.

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**ART. XLI.—*Nature of a Trustee's Duties, Powers and Privileges.***

(1) A duty of a trustee is an absolute obligation to do or to abstain from doing a certain act. When the obligation is to do the act it is a *positive* duty, when the obligation is to abstain from doing the act it is a *negative* duty.

(2) A power or discretion of a trustee is a positive duty of the trustee to exercise his judgment in coming to a decision whether or not a certain act shall be done or how or when a certain duty shall be performed, and to act, or to abstain from acting, in accordance with such decision. Where the power is to decide whether or not a certain act shall be done it is called an *absolute discretion*; where it is to decide how or when a certain duty shall be performed it is called a *discretion coupled with a duty*.

(3) A privilege of a trustee is a right of the trustee to apply to the court for its protection or relief in connection with the performance of his duties as trustee.

(4) The failure of a trustee in whom a power is vested to employ reasonable care, prudence, and intelligence in coming to a decision is a failure to perform the positive duty of exercising his judgment in that behalf.

(5) The failure to perform a positive duty or to observe a negative duty is a *breach of trust*.

(6) All the duties and powers vested in the original trustees by the trust instrument, on the death of one or two or more trustees, survive to the other or others surviving, and on the appointment of new trustees vest in such new trustees, unless it appears from the trust instrument that the settlor intended the duties and powers to be personal to the original trustees. On the death of a last surviving trustee the duties and powers imposed or conferred by the trust instrument now vest in the personal representatives of such trustee until new trustees are appointed.

#### PARAGRAPHS (1) AND (2).

What are usually called duties and what are usually called powers or discretions are both in their essence absolute duties. The difference between them does not lie in the nature of the obligation on the trustee, but in the nature of the act he is obliged to do. In the case of duties he is bound to do the thing prescribed, whether in his judgment it is wise to do it or not. In the case of powers or discretions he is bound to exercise his judgment as to whether it is wise to do a thing or not, and act accordingly. Thus, if £10,000 be vested in A. upon trust to receive the income until B. attains twenty-one years of age, and until then to pay the whole or such portion thereof as he may think proper for the maintenance and education of B., and on B.'s attaining twenty-one to hand over to him the trust fund and all accumulations, A. is under two absolute duties, and has one power or discretion. His absolute duties are to receive the income and to pay over the corpus of the trust fund and the accumulations to B. These duties he must perform whether he thinks the settlor was wise in making such provision for B. or not. His discretion is as to the amount which is to be devoted to the maintenance and education of B. during his minority. Here his duty is to decide how much of the income, if any, may, in his judgment, be wisely devoted to this object. He has no right to hand over the

whole or any part of the income without considering whether the money is wisely spent or not, any more than a jury have a right to decide by lot what their verdict shall be (*Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324; and see *Wilson v. Turner* (1883), 22 Ch. D. 521).

But powers are also absolute discretions as far as they are discretions at all. Provided the trustee exercises his judgment properly, and executes the power accordingly, the court will not interfere with his exercise of it. The difference between what is called an absolute power and a power coupled with a duty is this: Where the power is absolute, if the trustee in the exercise of his judgment refuses to execute the power at all, the court will not compel him to execute it, unless his refusal amounts to wilful default (*Rawsthorne v. Rowley* (1907), 24 T. L. R. 51). Where the power is coupled with a duty, the court will compel him to perform the duty, and any refusal to perform the duty will be regarded as a repudiation of the power coupled with it. If, however, he is willing to perform the duty, the court will not interfere with his decision as to how the power coupled with it is to be executed (see *per JESSEL, M.R.*, in *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571; Stra. L. C., p. 98).

Moreover, where a power is coupled with a duty and there are several trustees who cannot agree to the exercise of the power, then the duty prevails. Thus where trustees were directed to sell and given power to postpone sale, and all the trustees could not agree to postpone sale, the direction to sell became imperative (*In re Hilton*, [1909] 2 Ch. 548).

Thus, in *Re Bryant, Bryant v. Hickley* (*supra*), a testator directed his trustees that after the death or remarriage of his wife they should apply the whole or such part as they thought fit of the income of the expectant share of any child towards the maintenance of such child. The wife remarried, and the trustees in the exercise of their discretion refused to allow her any part of the children's income for their maintenance:—*Held*, that the discretion of the trustees was absolute, and not coupled with any duty, and that the court could not interfere with

their bona fide exercise of it (and see *Gisborne v. Gisborne* (1877), 2 App. Cas. 300).

Again, in *Re Hargreaves, Hick v. Hargreaves*, [1901] 2 Ch. 547, *note*), trustees were directed at their discretion to sell the trust railway stock and reinvest the proceeds. The trustees applied to the court for directions as to when they should sell such stock, and the court, being of opinion that though the trustees were bound to sell the stock sooner or later yet they had an absolute discretion as to when they should sell, held that it could not interfere with the bona fide exercise of such discretion. Here the power was coupled with a duty which the trustees were bound and willing to perform, but, so far as they had a discretion as to the mode or time of its performance, the discretion was absolute. (And see *Tempest v. Lord Camoys*, *supra*, p. 109.)

Powers coupled with the duty of managing the trust property are usually regarded as merely incidental to and part of the general scheme of management. When, therefore, the court undertakes the administration of the trusts, it exercises itself such powers. Thus, in *Tempest v. Lord Camoys* ((1882), 21 Ch. D., p. 576, *note*), a settlor devised to S. and F. his real estate upon trust to accumulate the rents and apply them for the benefit of certain persons, of whom F. was one. He empowered his trustees to let his mansion-house. In an administration suit the chief clerk, upon inquiry directed, found that the house should be let. F. objected:—*Held*, that the power to let was incidental to the scheme of management, and could be exercised by the court without F.'s consent. (And see *Re Courtier, Coles v. Courtier* (1887), 34 Ch. D. 136; and cf. *Tempest v. Lord Camoys*, *supra*, p. 109; and *Re Hill, Hill v. Pilcher*, [1896] 1 Ch. 962.)

Besides those expressly given by the trust instrument or by statute many powers are implied. Indeed, as we shall see, most of the duties of trustees must in the nature of things imply a certain discretion: e.g., a trust to invest in any security in which trust funds may by law be invested gives the trustee a discretion as to choosing the particular security.

As powers and discretions of trustees are duties, all that is hereinafter said as to duties and the mode in which they should be executed and observed applies equally to them ; and further, being duties, they cannot—as powers for the donee's own benefit may—be released by the trustee, nor extended or altered in their operation with the consent of a cestui que trust who is not absolutely entitled (*Weller v. Ker* (1866), L. R. 1 H. L. (Sc.) 11).

#### PARAGRAPHS (4) AND (5).

Whether a trustee has in any given instance employed reasonable care, prudence, and intelligence in coming to a decision is purely a question of fact (see *Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529). To cite authorities, as is often done, to show what amounts to reasonable care, prudence, or intelligence, is, it is submitted, a misleading and dangerous practice. It is an attempt to decide a point of fact, not by evidence, but by authority, and tends to the establishment of a doctrine of “constructive” want of care, etc., similar to the venerable but exploded doctrine of “constructive” fraud.

If examples are wanted of what has been held in specific cases to prove want of reasonable care, etc., see *infra*, notes to Art. XLIII., para. 4, and Art. LXVII. Further examples, and what is more valuable, a discussion of the matters which the court should take into consideration in deciding what amounts to negligence, will be found in *In re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300 ; and *Eaton v. Buchanan*, [1911] A. C. 253.

It is to be remembered that as far as absolute duties are concerned, the question of negligence does not arise. The trustee there is bound to do or refrain from doing a definite thing, and if in fact he fails to do or refrain from doing this he is guilty of a breach of trust, whether his failure arose from want of reasonable care, prudence, or intelligence or not. Where a discretion has to be exercised, on the other hand, the courts hold that the trustee must display reasonable care, prudence, and intelligence in coming to a decision, or he has not performed his duty, *i.e.*, has not exercised his discretion at all.

## PARAGRAPH (6).

The first part of this paragraph is a summarised statement of the law as enacted by sect. 22 (as to surviving trustees) and sects. 10 (3) and 37 (as to new trustees) of the Trustee Act, 1893. These sections were re-enactments of sects. 38, 31, and 33 respectively of the Conveyancing Act, 1881.

In order to prevent express duties and powers surviving to surviving trustees or being exercisable by new trustees, the intention of the settlor that they should be personal to the original trustees must be made very clear. Thus, in *Re Smith, Eastick v. Smith* ([1904] 1 Ch. 139), a testator appointed his wife M., together with C. and R., trustees of his will. He gave to "his trustees" all his estate in trust for his wife for life, with power to "the said trustees" at their discretion to sell all or any part of it:—*Held*, that the powers devolved on new trustees. (For the rule prior to the Conveyancing Act, 1881, see *In re Bacon, Turvey v. Bacon*, [1907] 1 Ch. 475.)

The trust estates vested in a sole trustee, whatever their nature (with the exception of legal copyholds), and whether he attempts to devise them or not, now devolve on his death on his personal representatives (see *supra*, Art. XXXVIII.). Such personal representatives take them subject to the trust, but formerly they took the powers of trustees duly appointed under the trust instrument only if the terms of the trust instrument showed that the settlor intended them to have them (*In re Crunden and Meux's Contract*, [1909] 1 Ch. 690). This has been altered by sect. 8 of the Conveyancing Act, 1911, as to trusts constituted after 1881. Now until new trustees are appointed, the personal representatives of the sole or last surviving trustee are entitled to exercise all the powers which could have been exercised by the sole or last surviving trustee, unless a direction to the contrary is contained in the trust instrument. So far as executors are concerned, "personal representatives" include only executors who prove the will. This enactment, however, does not seem to affect cases where through, for instance, the disclaimer of original trustees,

the trust property becomes vested in the settlor or his heir. It would seem that such settlor or heir is not a trustee under the trust instrument, and therefore cannot exercise express powers (see *Mallatt v. Wilson*, [1903] 2 Ch. 494).

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#### ART. XLII.—*Positive and Negative Duties of a Trustee.*

(1) It is an absolute duty of a trustee to carry out the directions of the settlor expressed in the trust instrument as to the trust property so far as such directions can be lawfully carried out.

(2) Subject to this, the trustee's positive duties under the general law of trusts are—

- (i) To preserve the trust property;
- (ii) To pay the income and corpus to the person entitled thereto;
- (iii) To give information to the cestui que trust as to the trust property;

The trustee's negative duties are :

- (i) Not to make profit out of the trust property;
- (ii) Not to purchase the trust property from his co-trustees;
- (iii) Not to delegate his duties.

This statement of the positive duties of a trustee is adopted from the judgment of LINDLEY, L.J., in *Low v. Bouverie*, [1891] 3 Ch. 82; Stra. L. C., p. 105: "The

duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestuis que trust, on demand, information with respect to the mode in which the trust fund has been dealt with and where it is."

The negative duties stated above might perhaps be described as the modes in which the positive duties are to be performed, but it seems simpler and more in accordance with usage to treat them as negative duties, which in fact they are.

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#### ART. XLIII.—*First Positive Duty : Preserving the Trust Property.*

Unless the trust instrument otherwise directs, or unless it gives the trustee a power in the exercise of which he otherwise decides, it is, in order to preserve the trust property, the duty of a trustee where and as soon after his acceptance of the trust as it is reasonably possible so to do :

- (1) To obtain a transfer of all the trust funds uninvested or invested in negotiable securities into his own hands solely or into the hands of himself and his co-trustees jointly, and a transfer of all the securities for trust funds into his own name solely or into the names of himself and his co-trustees jointly, as the case may be.
- (2) To sell, unless a contrary intention appears in the trust instrument, all wasting or reversionary personality or

unauthorised securities, where successive interests in the same are given to different cestuis que trust, and the trust instrument assuring such personality to the trustees is a will, and the gift is by way of residue.

- (3) And to invest the proceeds of trust property sold and called in, and the trust funds in his hands, in securities in which by law trust funds may be invested.
- (4) When the trust property is invested in securities in which by law trust funds may be invested, the trustee has a power, unless the trust instrument otherwise directs, to vary such investments from time to time when in his judgment alteration in the investments is for the benefit of the trust property.

All the duties stated in this Article are coupled with an implied discretion. The trustee is bound to perform them only "where and as soon after his acceptance of the trust as it is reasonably possible" to perform them.

Thus, in order to obtain a transfer of the trust property it may be necessary to take legal proceedings. If in the judgment of the trustee such proceedings would be futile, he is under no obligation to take them (*Re Brogden* (1888), 38 Ch. D. 546). Again, as to calling in securities, he may, in the exercise of his discretion, decide not to sell immediately if he reasonably thinks there is likely to be a rise in price (*Marsden v. Kent* (1877), 5 Ch. D. 598). Similar considerations apply to the selling of wasting and reversionary securities, and, in the nature of things, a trustee

who is bound to invest in some of many securities must have a discretion as to which he should select (see Trustee Act, 1893, sect. 3).

### PARAGRAPH (1).

A trustee is not justified in leaving money belonging to the trust (*Wynne v. Tempest*, W. N. (1897) 43; *Wyman v. Paterson*, [1900] A. C. 271), or bonds payable to bearer or negotiable instruments (*Matthews v. Brise* (1843), 6 Beav. 239) in the sole control of a co-trustee, and still less, of course, in the control of retired trustees or agents (*Field v. Field*, [1894] 1 Ch. 425). But title deeds or securities not payable to bearer are different. Thus, in *Re Sisson's Settlement*, *Jones v. Trappes*, [1903] 1 Ch. 262, a trustee had for some years sole custody of the title deeds to the trust property. There was no suggestion of dishonesty against him, or of any improper dealing with the deeds. Another trustee applied to the court to compel him to deposit the deeds in a box accessible only to the trustees jointly:—*Held*, that there were no special circumstances to justify such an order.

Getting in trust property includes getting satisfaction from former trustees for breaches of trust committed by them and causing loss to the trust property. But a new trustee is entitled to assume without inquiry that the former trustees discharged their duty properly, and it is only when he has notice of the breach that any duty to take proceedings arises (*Ex parte Greaves* (1856), 8 De G. M. & G. 291).

### PARAGRAPH (2).

This rule as to the duty to sell wasting, reversionary or unauthorised securities is called the rule in *Howe v. Lord Dartmouth* (1802), 7 Ves. 137. It applies only where the property is personalty and is given to the trustees by will by way of residuary bequest (*Re Van Straubenzee*, *Bousted v. Cooper*, [1901] 2 Ch. 779; Stra. L. C. 114). “So far as I am aware, the rule in *Howe v. Earl of Dartmouth* has never been applied except to a disposition

by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorised investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorised character: see *Pickering v. Pickering* (1839), 4 My. & Cr. 289, at p. 298; and *Macdonald v. Irene* (1878), 8 Ch. D. 101, at p. 112. But the rule does not apply to any bequest which is specific as distinguished from residuary." (*Per COZENS-HARDY, J.*, in *Re Van Straubenzee, Boustead v. Cooper, supra.*)

Where the wasting property is a leasehold in a foreign country and by the law of that country the life tenant would be entitled *in specie*, the rule in *Howe v. Dartmouth, supra*, does not apply (*In re Moses, Moses v. Valentine*, [1908] 2 Ch. 235).

It is to be remembered that the rule has no reference to express directions contained in the trust instrument, whether deed or will. Such directions must be obeyed, and it is under such directions that most conversions take place. Nor does the rule apply if an intention that the wasting securities should be held *in specie* appears in the trust instrument. This intention need not be expressly stated: it may be gathered from the instrument generally. Thus, where the only land the testator possessed was leasehold, a gift of the "rents and profits" of his property to the life tenant may be held to be a sufficient indication that he did not intend that the leasehold should be converted (see *In re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312). In the same way a gift over of the property *in specie* after the life tenant's death is also a sufficient indication that the life tenant is intended to enjoy it *in specie* (*ibid.*).

A trust to convert is usually accompanied by a power given to the trustees to postpone conversion if they think proper to do so. Where such a power is given all the trustees must concur in retaining the unauthorised securities or the trust for sale will prevail (*In re Hilton, Gibbes v. Hale-Hilton*, [1909] 2 Ch. 548).

## PARAGRAPH (3).

The securities in which any particular trustee may by law invest trust funds in his hands may be regulated either by express directions contained in the trust instrument or by sects. 1—6 of the Trustee Act, 1893, as amended by the Colonial Stock Act, 1900. The provisions contained in these two Acts apply to all trusts, whether created before or after the passing of the Acts, and are in addition to any powers of investment given by the trust instrument, unless the trustee is in the trust instrument expressly forbidden to invest in the securities therein enumerated (Trustee Act, 1893, sect. 1 ; and see *In re Burke, Burke v. Burke*, [1908] 2 Ch. 248).

The chief of these are real securities in the United Kingdom ; Government stock of the United Kingdom and India ; securities the interest of which is guaranteed by Parliament ; stock of the Banks of England and Ireland ; Metropolitan stock ; the debenture or rent-charge or guaranteed or preference stock of any railway company in Great Britain or Ireland, incorporated by special Act of Parliament, and having during the last ten years past paid a dividend of not less than 3 per cent. per annum on its ordinary stock, or stock of a railway company leased for not less than two hundred years to such a company ; Indian debenture stock, the interest on which or stock the minimum interest on which is guaranteed by the Secretary of State for India ; any county council inscribed stock or the inscribed stock of the corporation of a borough having at the last census a population exceeding 50,000 (see *Re Druitt*, [1903] 1 Ch. 446) ; the debenture stock of water companies having for ten years past paid dividends at the rate of at least 5 per cent. per annum ; and any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (sect. 1, Trustee Act, 1893 ; and see R. S. C. Order 22, rule 17). By the Colonial Stock Act, 1900, any colonial stock registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 to 1900, and with respect to which there have been observed such conditions as the Treasury may by order prescribe, is

included among the securities in which by law trustees may invest trust funds. But (notwithstanding the above provisions) trustees, unless the trust investment expressly empowers them so to do, are not entitled to invest in or hold certificates payable to bearer issued under—(a) the India Stock Certificate Act, 1863; (b) the National Debt Act, 1870; (c) the Local Loans Act, 1875; or (d) the Colonial Stock Act, 1877 (Trustee Act, 1893, sect. 7).

The above provisions are considerably qualified by sects. 2, 3, 4, 5 and 6 of the Trustee Act, 1893. Most of these sections have already been referred to, but one should particularly be mentioned. By sect. 5 (1) a trustee entitled to invest in real securities may invest—(a) on mortgage of leaseholds of which two hundred years at least are unexpired, and which are not subject to a rent greater than a shilling a year or to any condition of re-entry except for non-payment of rent; (b) or on any charge or mortgage of any charge made under the Improvement of Land Act, 1864.

It is to be remembered that when trust funds are capital money under the Settled Land Acts, 1882 to 1890, their investment depends upon those Acts. It is also to be noted that when there is an express power given to trustees to invest in securities outside those allowed by statute, the court will construe such power very strictly (*In re Maryon-Wilson Estate*, [1912] 1 Ch. 55). And where an express power to invest in the *purchase* of land is given there is until the contrary is shown an implied power to sell land purchased under such power (*In re Pope's Contract*, [1911] 2 Ch. 442). Where such a power exists in any trust created after December 31st, 1911, by which the property is settled as personalty, any land purchased by the trustees is to be held by them as on a trust for sale, *i.e.*, as personalty (Conveyancing Act, 1911, s. 10).

As has already been pointed out, the selection by a trustee of the security in which to invest trust funds is a discretion, and, like every other discretion, he in exercising it must employ reasonable care, prudence, and intelligence. It is not sufficient that the security in which he invests is one authorised by the trust instrument or by

the general law; it is his business to ascertain whether it is also a proper investment (see *In re Hunt's Estate*, [1905] 2 Ch. 418). Thus, he should not, unless expressly authorised so to do, invest trust funds in speculative securities. A mortgage of land, for instance, is among the investments authorised in sect. 1 of the Trustee Act, 1893, but a mortgage of a building estate where the houses have not yet been tenanted, and so have no certain market value (*Learoyd v. Whiteley* (1887), 12 App. Cas. 727, at p. 731), is at any rate *prima facie* an improper investment though apparently it may be held good where circumstances indicate that the unfinished houses will when finished be a good security (*Shaw v. Cates*, [1909] 1 Ch. 389); *sed quare*. On the other hand, investment on the security of a contributory mortgage, *i.e.*, one in which several mortgagees advance the loan (*In re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328), or of a second mortgage (*Chapman v. Browne*, [1902] 1 Ch. 785), would *ipso facto* constitute a breach of trust.

#### PARAGRAPH (4).

Unless it is expressly excluded by the trust instrument, a power to vary the investment of the trust funds is implied by sect. 1 of the Trustee Act, 1893. This statutory power applies not merely to investments made under the Act, but to all investments (*Re Dick, Lopes v. Hume Dick*, [1891] 1 Ch. 423).

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#### ART. XLIV.—*Second Positive Duty: Paying over the Trust Property.*

(1) It is an absolute duty of a trustee to pay and transfer the income and corpus of the trust property to the cestuis que trust respectively entitled thereto, or (if they are dead) to their legal representatives.

(2) Provided he acts in good faith, and without notice, a trustee is, however, justified in paying trust money:

- (i) To a person appointed by power of attorney, given by the cestui que trust, to receive it, although the cestui que trust is dead or has avoided the power;
- (ii) To the original cestui que trust though he has previously assigned his interest in the trust fund to another person.

#### PARAGRAPH (1).

This being an absolute duty, the question of negligence does not arise: if the trustee fails to perform it he is guilty of a breach of trust, to whatever cause his failure is due. Thus, if through the fraud of some other person the trustee is induced to pay trust money to a person who is not entitled to it (*Re Bennison, Cutler v. Boyd* (1889), 60 L. T. 859), or if by an honest but mistaken interpretation of the instrument of trust he distributes the trust funds wrongly (*Hilliard v. Fulford* (1876), 4 Ch. D. 389), he is liable, strictly speaking, to refund all the money improperly paid away to the cestui que trust properly entitled to it. As we shall see, this rule is now mitigated by the right of a trustee to obtain the direction of the court (*infra*, Art. LIX.), and by the powers of relief given to the court by the Judicial Trustees Act, 1896 (*infra*, Art. LXXIII.).

#### PARAGRAPH (2).

A power of attorney may be revoked either by express revocation or by the death of the grantor of the power. And once it is revoked the attorney's right to represent the grantor is gone, and he is unable to give a discharge to persons paying money to him owing to the grantor, whether he or they know of the revocation or not. As far as payments made by trustees to a person acting in pursuance of a power of attorney are concerned, the law is now altered by sect. 23 of the Trustee Act, 1893 (re-enacting sect. 26 of the Law of Property Amendment Act, 1859), which in effect makes such payments effectual where the trustee had no notice of the revocation, and

gives to the grantor of the power as against the person receiving the payment all the remedies he would formerly have had against the trustee.

The second part of the paragraph simply amounts to this, that the trustee is not bound to know what the different cestuis que trust do with their interests. Until he has notice to the contrary, he is entitled to assume that the trust property belongs to the persons entitled under the trust instrument. It would seem that before he pays an assignee of whose assignment he has notice, he is bound to investigate the assignee's title or he will be affected with notice of any earlier assignment disclosed in it (*Davis v. Hutching*, [1907] 1 Ch. 356) : while at the same time on paying the assignee he is not entitled to delivery of the deed of assignment (*In re Palmer*, [1907] 1 Ch. 486).

Where the trust is discretionary, an assignee is just as much subject to the discretion as was the cestui que trust (*Train v. Clapperton*, [1908] A. C. 342).

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#### ART. XLV.—*Persons entitled to Income and Corpus.*

As to the persons entitled to the income and corpus respectively :

- (1) Where the trust property is wasting or other personality, which, whether by virtue of the rules set out in Art. XLIII., or by reason of an express direction in the trust instrument to that effect, should have been, but is not, sold by the trustee, it is the duty of the trustee, while the property remains unsold, to pay to the cestui que trust entitled to the income, not the actual income of the property, but interest at the rate

of 3 per cent. per annum on the capital value of the property. Where, however, by the terms of the trust, the trustee has a power to postpone the sale of the property, if there is no express trust for sale, the cestui que trust is entitled to the whole income of the trust property till sale, but if there is an express trust for sale, then, if on a proper construction of the trust instrument (i) it does not appear that the postponement was intended to benefit the cestui que trust entitled to the income, such cestui que trust should until sale be paid interest on the value of such property at the rate of 3 per cent. per annum, but (ii) if it does appear that the postponement was intended to benefit him, then the income actually accruing from the property.

- (2) Where the trust property is reversionary property which, whether by virtue of Art. XLIII., paragraph 3, or by reason of an express direction in the trust instrument to that effect, should have been, but is not, sold by the trustee, it is the duty of the trustee upon the reversionary property falling into possession to estimate what sum, if invested at the time the property should have been sold at 3 per cent. per annum, would with compound interest have amounted to the value of the property when it fell into possession. This sum, as representing the corpus, he should hold on the trusts

declared by the trust instrument. The balance between it and the actual value of the property when it fell into possession he should pay in lieu of income to the person entitled to the income.

- (3) Where the trustees invest trust money on improper security they may pay the whole income arising from such investment, though it is more than 3 per cent. per annum on the capital, to the cestui que trust entitled to the income, and the remainderman will have no claim to any part of such additional income if, when the trust money is called in, there is no loss to the trust property.

Where the trust money is invested on proper security but the interest due thereon is not fully received, then the interest received before the realisation of the security should be paid to the person entitled to the income, and on realisation the money received for the security should be divided between the income and capital of the trust property in the same proportion as the arrears of income bear to original capital.

- (4) Subject to any directions in the trust instrument to the contrary or to a power in the exercise of which the trustee otherwise decides, current expenses of administering the trust, the cost of repairs of leaseholds part of the trust property, and interest on capital charges, are payable out of the *income*

of the trust property; the cost of legal proceedings to protect the trust property, and capital charges, are payable out of the *corpus* of the trust property; while the cost of repairs of copyholds and freeholds part of the trust property, and fines for the renewal of leaseholds, are to be apportioned between income and corpus, as the court may direct.

#### PARAGRAPHS (1) AND (2).

The rule stated in paragraph (1) applies not merely to wasting property but to all personalty which has not been sold when it should have been sold, whether the duty to sell arose because the investment was not authorised or because there was a direction to convert contained in the trust instrument (*In re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; *In re Anson's Settlement*, [1907] 2 Ch. 424). It applies also where there is a power to postpone the sale but no indication that the life tenant was to have the income in full of the unauthorised investment or wasting property (*ibid.*). But where there is a direction that the trustees may in their discretion retain them (*In re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111), at any rate where there is no express direction to convert (*In re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394), the life tenant is entitled to the whole income. And in cases of investments in shares where the company returns capital in the shape of new shares, fully paid out of reserve profit, these go as income to the life tenant (*In re Piercy, Whitwharn v. Piercy*, [1907] 1 Ch. 289). But where the company has power to deal with profits as income or capital the life tenant is bound by the company's decision (*Blyth's Trustees v. Milne* (1906), 7 F. 799).

The rule has no application where the trust property is realty (*In re Earl Darnley*, [1907] 1 Ch. 159). There, where there is a power to postpone the sale, or even where there is no such power but there is delay,

not so great as to be unreasonable, the life tenant is entitled to the actual profits of the land (save royalties from minerals) until sale—even when the proceeds of the realty when sold are given along with the proceeds of the personalty directed to be sold (*In re Oliver*, [1908] 2 Ch. 74).

The effect of the rules stated in paragraphs (1) and (2) will best be shown by an example: A testator by his will bequeaths his interest in Blackacre and in £10,000, settled under his father's will, to A. and B. as trustees on trust to convert the same as soon as possible and invest the proceeds and pay the income to C. for life, and on C.'s death to divide the trust funds between D. and E. The testator's interest in Blackacre is a leasehold residue of twenty years; his interest in the £10,000 is absolute subject to a life interest in the income vested in X. For some reason or other the trustees sell neither interest. The market value of the interest in Blackacre was at the testator's death £5,000, and on that valuation the net income was £500, *i.e.*, 10 per cent. per annum. C., the life tenant, is not entitled to the whole £500 per annum, but only to such portion of this as would amount to the interest on £5,000 if such £5,000 had been invested in securities permitted by the trust instrument or by the law. The balance of the £500 would be held by the trustees as capital, and the income arising from it would also be payable to C. (*Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4). As to the £10,000, until X.'s death that produces no income. Say X. dies ten years after the testator. The trustees should then have an estimate made as to what sum would at 3 per cent. compound interest during ten years produce £10,000. Say this sum would be (roughly) £7,000. Then the £3,000 left after this is deducted from the actual value (£10,000) would be paid to C. as income, while the £7,000 would be retained as corpus.

#### PARAGRAPH (3).

The rule stated here with regard to investments on improper security is now approved by the decision of the Court of Appeal in *Slade v. Chaine*, [1908] 1 Ch. 522;

Stra. L. C. 158. There a sole trustee applied part of a trust fund for his own purposes, paying the life tenant 5 per cent. per annum interest on the money so misapplied. Afterwards he replaced the trust money in full. The remainderman claimed that the life tenant should refund and add to the corpus of the trust estate all interest she had received over 3 per cent. :—*Held*, that no such claim could be sustained. This is the case even where the trustee who made the improper investment is himself the life tenant who benefits by the larger interest (*In re Hoyles, Row v. Jagg*, [1912] 1 Ch. 67).

The personal liability of the trustee is not being here considered. That will be discussed later (see *infra*, Art. LXVIII).

Where the investment was proper but resulted in a loss, whether the investment was made by the settlor or the trustees, no conflict between the interests of the life tenant and the remainderman arises until the security is realised. Till then the life tenant is entitled to whatever income the investment produces (*In re Broadwood*, [1908] 1 Ch. 119). On realisation the proceeds are to be apportioned as stated in the Article (*In re Atkinson*, [1904] 2 Ch. 160).

#### PARAGRAPH (4).

This seems to be the effect of the decisions, which, however, are not easily reconcilable.

Perhaps it should be noted that where income tax is deducted from income before it is received by the trustees, the trustees in paying annuities charged on the income should deduct income tax (*In re Sharp*, [1906] 1 Ch. 792).

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#### ART. XLVI.—*Third Positive Duty: giving Information as to the Trust Property.*

It is an absolute duty of a trustee, on the application of a cestui que trust, whether such

cestui que trust's interest in the trust property is vested or contingent, to give such cestui que trust all reasonable information as to the way in which the trust property has been dealt with, and the present state of its investment, and also the opportunity and means of verifying such information. For such purpose of verification he should keep intelligible accounts which will enable the inquiring cestui que trust to see the effect of such dealings and investment upon his interest in the trust property.

As said by JESSEL, M.R., in *Heugh v. Scard* (1875), 33 L. T. 659 : "In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the trustee pay the costs of litigation caused by his neglect or refusal." (And see *Re Dartnell, Sawyer v. Goddard*, [1895] 1 Ch. 474.)

This rule—that a trustee must supply the cestuis que trust with accounts, and that if he fails unreasonably so to do he may be held liable personally to pay all costs—is well illustrated in *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289 ; Stra. L. C. 133. There a testator left by his will £2,000 charged on his whole estate upon trust for his daughter, E. A. Cooper. Mrs. E. A. Cooper applied to the trustees repeatedly for accounts, and finally received an account which showed no distinction between the corpus and income of the trust property. The plaintiff then obtained from the court an order for the administration by the court of the trusts of her father's will. An account was directed, and on its receipt the court, on the ground that the trustees had never supplied the cestui que trust with proper accounts, and therefore had not discharged their duty, held that the trustees must not merely supply such accounts, but, as it was their neglect to do so that caused the action for administration, that the trustees were liable for the costs of the hearing and accounts. (And see *In re Linsley*, [1904] 2 Ch. 785.)

Two further points should be remembered. A trustee is bound to give information as to his own dealings

with the trust funds: he is not bound to give either to the cestui que trust, or to an intending purchaser from the cestui que trust, information as to the dealings of the cestui que trust himself with his interest in the trust funds even when he has had notice of such dealings (*Low v. Bouvierie*, [1891] 3 Ch. 82; Stra. L. C., p. 105). Secondly, no agreement between trustees as to costs or expenses precludes the cestui que trust's right to an account of such costs and expenses. As to the latter point, in *Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413, two trustees agreed that the costs due to one of them for work done for the trust amounted to a certain sum. The cestui qui trust objected to this agreement:—*Held*, that he was entitled to have the account investigated. And even where the cestui que trust himself agreed to the charges, on proof of overcharge the court will re-open the settled account (*Cheese v. Keen*, [1908] 1 Ch. 245; Stra. L. C., p. 120).

Remuneration does not alter the liability of the trustees, except perhaps to this extent, that a trustee who undertakes for payment to do certain work must be held to represent himself as reasonably qualified to do such work (see *Jobson v. Palmer*, [1893] 1 Ch. 91, and see *infra*, Art. LXXIII.).

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#### ART. XLVII.—*First Negative Duty: not to make Profit out of the Trust Property.*

(1) It is an absolute duty of a trustee not to deal with the trust property in such a way as to make for himself a personal profit out of it or out of his dealings with it.

(2) He is not entitled to receive any remuneration out of the trust property for his work as trustee, unless—

(i) The trust instrument expressly directs or permits him to receive such remuneration; or

- (ii) he has, before accepting the trust, stipulated with the cestuis que trust (these being all *sui juris*) to receive remuneration; or
- (iii) the trust property is situate abroad in a country where, by the local law or custom, trustees are entitled to remuneration.

The position of a trustee is well illustrated by *Vipont v. Butler*, W. N. (1893) 64. There a solicitor trustee who, if he had acted as solicitor, would have been entitled under the trust deed to charge ordinary professional remuneration for his services, sent certain legal work connected with the trust to another solicitor, under an arrangement by which he, the solicitor trustee, was to receive the ordinary commission for such work:—*Held*, that as he was not the solicitor acting for the trust, the commission he received was an improper profit made by him out of his dealings with the trust property, and that he was liable to account to the trust estate for such profit. (And see *Parker v. McKenna* (1874), L. R. 10 Ch. 314; Stra. L. C., p. 6.)

Even where a professional trustee is expressly authorised by the trust instrument to charge for his services, the court will permit him to charge only for his professional services (see *In re Chalinder and Herington*, [1907] 1 Ch. 58).

Where a trustee is made a director of a company, his qualification and the ground of his appointment being shares in the company which he holds as trustee, his fees as director are not a profit obtained by him out of the trust estate, but payment for his services as director, and so may be retained by him (*In re Dover Coalfields Exploration, Limited*, [1907] 2 Ch. 76; cf. *In re Francis* (1905), 74 L. J. Ch. 198). Not infrequently now a corporate body acts as trustee. It seems that though the corporate body in such case cannot make a profit out of its dealings with the trust property its officers may. *Sed quere* (*Bath v. Standard Land Company*, [1911] 1 Ch. 618).

Though a trustee is not entitled, save under the conditions set out in the Article, to receive profits out of the trust property, he is, as we shall see, always, when he acts properly, entitled to an indemnity for all costs and expenses incurred by him in connection with the trust estate. (And see *Re Bodega Company, Limited*, [1904] 1 Ch. 276.)

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**ART. XLVIII.—Second Negative duty: not to Purchase the Trust Property from himself or his Co-trustees.**

(1) It is an absolute duty of a trustee, as long as he remains a trustee, not to buy or to take a lease or a mortgage of the trust property for his own benefit, either from himself or from himself and his co-trustees. This duty imposes on the trustee an absolute incapacity to take a good title to the trust property in breach of the duty.

(2) This incapacity continues after he has ceased to be a trustee where, from the circumstances, the court is of opinion that he ceased to be a trustee with a view of qualifying himself to buy or to take a lease or mortgage of the trust property.

(3) The incapacity, while he remains a trustee, can be removed only—

(i) by virtue of an express power in that behalf contained in the trust instrument; or

(ii) by the consent of the court.

The point to be noted here is not as to a purchase by the trustee from the cestui que trust—which under

proper conditions is quite legal (see *infra*, Art. LXIII., paragraph 3)—but as to a purchase by a trustee from himself or from his co-trustees, which is in ordinary circumstances quite illegal (see *Williams v. Scott*, [1900] A. C. 499).

Practically, save where, as stated in the Article, the sale is in pursuance of a special power—as where a testator gives one of his trustees a right to buy his business at a certain price within a certain time—or where the court gives a trustee express permission to buy, all purchases of trust property by a trustee from himself or his co-trustees are liable to be set aside by the court without any evidence that the purchase was unfair, or that the trustee took any improper advantage in the transaction (*Fox v. Mackreth* (1788), 2 Bro. C. C. 400).

Where, however, the trustee has before the purchase ceased to be a trustee, then the validity of the purchase by him of property of which he once was trustee depends on the view of his conduct the court takes on the evidence. That is, the purchase is not *ipso facto* voidable; it is voidable only if the court comes to the conclusion that the former trustee acted improperly. Thus, in *Re Boles and British Land Company's Contract*, [1902] 1 Ch. 244, a trustee, after twelve years' retirement from the trust, bought the trust property. There was no evidence whatever that he had retired with any view of subsequently purchasing the trust property, nor that he took any unfair advantage of the knowledge of the property which he had acquired as trustee:—*Held*, that in the absence of such evidence the purchase was quite valid.

The rule prohibiting purchases from co-trustees extends to purchases from other purchasers from the trustees while the contract of purchase with the trustees is executory. Thus, in *Williams v. Scott, supra*, a trustee agreed to sell certain trust property to A. A. being unwilling or unable to complete the transaction, the trustee took over the contract and accepted a conveyancee. Subsequently the trustee resold, but the purchaser, on investigation of title, refused to complete,

on the ground that the trustee's title was not good, being based on a purchase from himself as trustee :—*Held*, that this objection was good.

The rule applies not merely to express trustees, but to every one in a fiduciary position, such as the director of a company (*Parker v. McKenna* (1874), L. R. 10 Ch. 314; *Stra. L. C.*, p. 6), the receiver of an estate (*Nugent v. Nugent*, [1908] 1 Ch. 546), the life tenant of an equity of redemption (*Griffiths v. Owen*, [1907] 1 Ch. 195), etc.

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**ART. XLIX.—*Third Negative Duty: not to Delegate his Duties.***

(1) Subject to the powers hereinafter mentioned, it is an absolute duty of a trustee not to delegate the performance of his duties either to his co-trustees or to an agent.

(2) A trustee has power to delegate duties—

- (i) Where and in so far as such delegation is practically unavoidable, or is usual in the ordinary transactions of business of the nature of the duty delegated;
- (ii) Where such delegation is specifically permitted by the trust instrument;
- (iii) Where such delegation is specifically permitted by statute.

(3) Unless a contrary intention is expressed in the trust instrument, a trustee is, since December 24th, 1888, permitted by statute to delegate—

- (i) To a solicitor the duty of receiving and giving a discharge for moneys payable

to the trustee by permitting him to have the custody of and to produce a deed containing a receipt signed by the trustee, and this deed will be a sufficient authority to the person liable to pay such moneys for paying them to the solicitor;

- (ii) To a banker or solicitor the duty of receiving and giving a discharge for any moneys payable to a trustee under a policy of insurance by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee (Trustee Act, 1893, sect. 17).

#### PARAGRAPHS (1) AND (2).

The case which perhaps best illustrates the modern view of the above rule is *Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529. There the trustees held as part of the trust investments certain bearer securities with coupons attached for the payment of the annual interest due on the securities. These were deposited with a banker with authority given him to remove from time to time the coupons, and claim the interest on behalf of the trustees as it became due. This was held a proper delegation of the duties, since it was the conduct which would be followed by any reasonably prudent man looking after his own affairs.

As an example of what may be considered a practically unavoidable delegation, see the case of *Field v. Field*, [1894] 1 Ch. 425. There the trustees held a building estate which was being let off from time to time in plots. In order to save the constant reference to the trustees to produce title-deeds to prove title, the trustees left these with the solicitors for the trust estate:—*Held*, that under the circumstances this was perfectly reasonable, and therefore proper. (And see *Re Brier, Brier v.*

*Erison* (1884), 26 Ch. D. 238; *Speight v. Gaunt* (1884), 9 App. Cas. 1; and *In re O'Flanagan and Ryan's Contract*, [1905] 1 I. R. 280.)

It is to be noted that, in order to render the delegation proper, it is necessary not merely that the circumstances should be such as to justify the trustee in delegating his duties, but also that the delegation should be to a proper agent. However right it may be that the trustee should delegate his duties, if he employs, say, a stock-broker to do what is properly a banker's business, or a lawyer to do what is properly a valuer's business, he is guilty of negligence in exercising his power to delegate, and so is liable for breach of trust (*Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; and see further, *infra*, Art. LXVII.).

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#### ART. L.—A Trustee's Equitable Powers.

In addition to powers specifically given by the trust instrument or by statute, a trustee has implied or equitable powers to do any act or execute any instrument which may be reasonably necessary for the purpose of carrying out the duties imposed on him by the general law or the trust instrument.

The duties of a trustee have been stated. It necessarily follows that he must have the powers necessary to enable him to carry out such duties. Thus he has an implied power to take such proceedings as may be necessary to protect the trust estate (*Re Ormrod's Settled Estate*, [1892] 2 Ch. 318; *Stott v. Milne* (1884), 25 Ch. D. 710; Stra. L. C., p. 127, and see *infra*, Art. LXII.), though where the estate is land his more prudent course is to apply for the authority of the court under sect. 36 of the Settled Land Act, 1882. Again, he has power where the immediate realisation of the trust estate would be disastrous to postpone it (*Ward v. Ward* (1843), 2 H. L. Cas. 777, at p. 784), though, again, the more prudent course is to apply for the sanction

of the court under R. S. C. Order 55. Where express powers are given by the trust instrument, they carry with them all the powers necessary to make them effective. Thus, where the trustee is given the management of the trust estate, he has power to do the necessary repairs (*Re Fowler, Fowler v. Odell* (1881), 16 Ch. D. 723), and to grant reasonable leases (*Fitzpatrick v. Waring* (1882), 11 L. R. Ir. 35).

A power once very important is the power to refuse payment of the trust money of a wife to her husband until the wife has had an opportunity of claiming her equity to a settlement: this is explained where we deal with married women's property.

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#### ART. LI.—*Statutory Power: as to selling Trust Property.*

When by the trust instrument a trustee is entitled to sell trust property, he may sell it in whatever mode he may decide is for the benefit of his cestui que trust; but unless the trust instrument came into operation since December 31st, 1881, he cannot concur with any other person in selling nor sell subject to prior charges, and, even if it came into operation since that date, unless with the consent of the court, he cannot, where the trust property is land, sell the surface, reserving the minerals, except, in either case, the trust instrument gives him an express power so to do.

A trustee can buy in the property at an auction or vary or rescind a contract of sale.

The above is the effect, shortly stated, of sects. 13, 14, and 44 of the Trustee Act, 1893. Sects. 13 and 14 re-enacted substantially sect. 35 of the Convey-

ancing Act, 1881, and sect. 3 of the Trustee Act, 1888.

Strictly speaking, a trustee, whenever his trust instrument came into operation, may sell jointly with another person, but when it came into operation before December 31st, 1881, the onus lies on him of proving that it was for the benefit of the cestuis que trust that he should so sell (*Cooper v. Harlech* (1876), 4 Ch. D. 802). This, of course, makes such a proceeding practically impossible.

Leaseholds may be sold by trustees by way of under-lease (*In re Judd and Skelcher*, [1906] 1 Ch. 684); and a sale means a sale for money, not, for instance, for payment of an antecedent debt (*Capell v. Winter*, [1907] 2 Ch. 376). For the form of order for a sale of the minerals and surface of land separately, see *In re Hallowes' Trust*, [1906] 1 I. R. 526.

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#### ART. LII.—*Statutory Power: to Arrange as to Debts and Disputes Relating to Trust Property.*

If, and in so far as, no contrary intention is expressed in the trust instrument, a trustee has a power to enter into any arrangement as to accepting composition or security for debts or property claimed, or allowing time for the payment of debts, or settling debts, claims, accounts, or other things relating to the trust estate, and to do anything he may think expedient to carry out this arrangement (sect. 21, Trustee Act, 1893, re-enacting sect. 37 of the Conveyancing Act, 1881).

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**ART. LIII.—Statutory Power: to give Receipts for Trust Property.**

A trustee has power to give a receipt in writing for any money, securities, or other personal property owing to him as trustee, which shall be a sufficient discharge for them, and shall effectually discharge the person who owed them from seeing to their application or being answerable for their loss (sect. 20, Trustee Act, 1893, re-enacting sect. 36 of the Conveyancing Act, 1881).

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**ART. LIV.—Statutory Power: to Renew Trust Leaseholds.**

Where leaseholds renewable by contract, custom, or usual practice, are held on trust, the trustee has power (which, if required by the cestui que trust, he must exercise) to renew the leases and to do any acts requisite for such purpose. If the cestui que trust entitled for the time being to the leaseholds is entitled to enjoy them specifically without liability for costs of renewal, the trustee may not exercise this power without the consent in writing of such cestui que trust. On renewal the trustee has power to pay the fine (if any) or expenses out of trust funds in his hands or raised by mortgage of the renewed leaseholds or other hereditaments settled on the same trust (sect. 19 of the Trustee Act, 1893, replacing sect. 10, Trustee Act, 1888).

As to the mode in which the expenses of renewal are to be borne by the different cestuis que trust interested in the leases, see *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61.

**ART. LV.—Statutory Power: to Insure Insurable Trust Property.**

Subject to the directions contained in the trust instrument, a trustee has power to insure insurable trust property (provided such property is not property he is bound to convey to the cestui que trust absolutely on being required so to do) to any amount not exceeding three-fourths of its value. On doing so he may pay the premiums out of the income of the trust property without the consent of the cestui que trust for the time being entitled to such income (sect. 18, Trustee Act, 1893, replacing sect. 7, Trustee Act, 1888).

Chattels settled to accompany the land are insurable property within this enactment (*In re Earl of Egmont's Trusts*, [1908] 1 Ch. 821). As to the right of a remainderman to insist on the insurance money paid after a fire being used for rebuilding and repairs, see *In re Quicke's Trusts*, [1908] 1 Ch. 887.

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**ART. LVI.—Statutory Power: to Allow Maintenance for Infant Cestui que Trust.**

A trustee who holds property in trust for an infant for life or for a greater interest, and, either absolutely or contingently, to vest not later than his attaining twenty-one years of age, has power, provided the property is a portion or the gift of it carries the income, to apply the income or any accumulation of it, or any part of either, in such a way as he shall think fit for the benefit of the infant. Subject to this power, it is the duty of the trustee to accumu-

late the income for the benefit of the person who ultimately becomes entitled to the settled property (sect. 43 of the Conveyancing Act, 1881).

Where the property held is pure personalty, and there are several infants jointly entitled to it on severally attaining twenty-one, it seems that each infant on attaining twenty-one is entitled only to the income on an aliquot part of the fund (*Re Holford, Holford v. Holford*, [1894] 3 Ch. 30), while where the property is realty, the first child to attain twenty-one is entitled to the whole income until the next child attains that age, when he becomes entitled to a share, and so on (*Re Acerill, Salsbury v. Buckle*, [1898] 1 Ch. 523). While all are infants the whole income may be used for their benefit jointly (*Re Adams, Adams v. Adams*, [1893] 1 Ch. 329). As to what is meant by "the benefit" of infants, see *Lowther v. Bentinck* (1875), 31 L. T. 719.

The persons "ultimately entitled" are the persons ultimately entitled to the property. Thus, where property was settled contingently on their attaining twenty-one, for the benefit of certain children for life and afterwards on other trusts, the children, on attaining twenty-one, were held entitled only to the interest accruing on the accumulations of income during their minority (*In re Bowly*, [1904] 2 Ch. 685, overruling *In re Scott, Scott v. Scott*, [1902] 1 Ch. 918).

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#### ART. LVII.—*Jurisdiction of Court in Emergency to give Trustees Powers outside Trust Instrument.*

Where, in the administration of a trust, an emergency arises which it is reasonable to believe the settlor did not foresee, the court has jurisdiction to authorise the trustee to do an act

which is not within the powers vested in him by the trust instrument.

In the case of *Re Tollemache*, [1903] 1 Ch. 457; affirmed, [1903] 1 Ch. 955, KEKEWICH, J., states the most usual instances in which the court exercises this jurisdiction of empowering trustees to do something not permitted by the general law or the trust instrument. These are—first, advances out of capital for the benefit of infants; secondly, postponing realisation of securities where it would be disastrous; thirdly, accepting shares in reconstructed companies; and fourthly, foreclosure by mortgagee trustees where the trust instrument gives no power to invest trust money in the purchase of real estate. (The last mentioned point is now provided for by statute. By sect. 9 of the Conveyancing Act, 1911, where trustees foreclose a mortgage, or become entitled to the mortgaged land under the Statute of Limitations, they may without application to the court hold the land upon a trust for sale—that is as personalty: Art. LXXXVIII.—and until sale apply the income as if it were the interest accruing on the mortgage debt.) These are regarded as real emergencies, which the court may assume the settlor, if he had foreseen them, would have given the trustees power to deal with, and therefore cases where the court may in proper cases supply the necessary power. But the mere fact that an unauthorised investment would appear to be for the benefit of the *cestuis que* trust is not such an unforeseen emergency (*Re Tollemache, supra*).

The principle was thus stated by ROMER, L.J., in *Re New*, [1901] 2 Ch. 534, at p. 543: "The court may on an emergency do something not authorised by the trust. It has no general power to interfere with or disregard the trust; but there are cases not foreseen or provided for by the author of the trust, where circumstances require that something should be done."

*Neill v. Neill*, [1904] 1 I. R. 513, is an example of power given outside the trust. The trust property there consisted of an Australian farm which was in danger of forfeiture through certain expenses not being

incurred. There was no trust money to provide for these. The court gave power to raise it by mortgaging the farm.

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### ART. LVIII.—*Trustee's Right to an Indemnity out of the Trust Property.*

(1) A trustee is entitled to reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust and powers. For this purpose, though such expenses are primarily payable out of the corpus, the trustee has, until they are discharged, a lien for them on both the income and corpus of the trust property.

(2) Where a cestui que trust absolutely entitled and *sui juris* accepts the beneficial estate in the trust property, the trustee has a personal right against such cestui que trust to be indemnified against such expenses, and such right continues after the cestui que trust has assigned the beneficial estate to a new cestui que trust, even though the trustee concurred in such assignment and accepted an indemnity from the new cestui que trust.

#### PARAGRAPH (1).

“A trustee may be allowed to institute or defend a suit at the cost of the estate, where the suit has reference to the estate. Where, for instance, a claim is made upon the estate, the court allows the trustee his costs of resisting such claim, though his personal conduct is not called in question; but the court will not allow a trustee his costs of defending a suit solely for the purpose of repelling charges of personal misconduct” (*per Lord ROMILLY, in Walters v. Woodbridge (1878), 20 W. R. 520.*)

The case here cited well illustrates the principle on which the court proceeds. A trustee had compromised certain claims against the trust estate. His action in so doing was impugned by the cestuis que trust, and an action was brought to have the compromise set aside on the ground that it was fraudulent. The action was decided in favour of the trustee. He claimed to have his costs out of the trust estate. Lord ROMILLY held that, the action being against his personal character, he was not entitled to this. On appeal, JESSEL, M.R., without questioning the principle laid down by Lord ROMILLY (*see supra*), held that, though the trustee's personal conduct was impeached, nevertheless the action was in substance one to set aside a compromise which, it had been held, was for the benefit of the trust property. It was therefore an action relating to the trust property in part at any rate, and such being the case, the trustee was entitled to an indemnity for the costs he had been put to (*Walters v. Woodbridge* (1878), 7 Ch. D. 504).

Compare with this the case of *Re Dunn, Brinklow v. Singleton*, [1904] 1 Ch. 648, where a receiver—who for this purpose is in the same position as a trustee—was simply sued for fraudulent dealing with the estate. He proved his innocence, and as the plaintiff was a man of straw, from whom he could obtain no costs, he desired to have these made a charge on the estate:—*Held*, that as his success in the action could not possibly benefit the trust estate, he was not entitled to have this done.

In *Stott v. Milne* (1884), 25 Ch. D. 710; Stra. L. C. 127, the plaintiff was tenant for life of certain freehold property of which the defendants were trustees. He had warned them that if they did not bring actions in respect to certain interferences with the property, he should hold them liable. They, on the advice of counsel, brought an action which they compromised before trial. The plaintiff then, on the ground that the particular action was not brought with his knowledge or consent, claimed that the costs of it were not payable out of either the income or the corpus:—*Held*, that as the action was properly brought for the protection of the

trust property, they were a charge on both. (And see *Bennett v. Wyndham* (1862), 4 De G. F. & J. 259.)

Where the trustees are not personally to blame they have a first right to be indemnified out of the trust property, even where the trust is fraudulent (*Ideal Bedding Company, Limited v. Holland*, [1907] 2 Ch. 157), or where the solicitors for the plaintiffs in an action against them get a charging order for the costs of the action against the trust property under sect. 28 of the Solicitors Act, 1860 (*In re Turner*, [1907] 2 Ch. 539).

#### PARAGRAPH (2).

In *Hardoon v. Beliliros*, [1901] A. C. 118, the plaintiff had certain partly paid up shares bought by his employers registered in his name : he held them of course as presumptive trustee for his employers. Subsequently these shares were transferred by the employers to the defendant, the plaintiff still continuing the registered and therefore legal owner. Calls having been made upon the plaintiff in respect to the shares, he claimed a personal indemnity from the defendant :—*Held*, that in the absence of any contract to the contrary he was entitled to this. Lord LINDLEY said (at p. 124) : “Where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable ; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser v. Murdoch* (1881), 6 App. Cas. 855. But where the only cestui que trust is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property ; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. And this right to an indemnity continues after the cestui que trust has parted with the beneficial estate. Thus, in *Mathews v. Ruggles-Brise*, [1911] 1 Ch. 194,

two partners in a firm took, on the firm's behalf, a lease of land which contained onerous covenants. They were, as has been stated, entitled to an indemnity from the partnership on trust for which they held it. The partnership was wound up and a company took over the beneficial interest in the lease. The company subsequently made default, and the two former partners had to liquidate the liabilities under the covenants in the lease:—*Held*, that they were entitled to an indemnity from all the persons who formed the partnership when the lease was taken, although the company had in the assignment covenanted to indemnify the trustees.

As an example of a contract which may exclude the trustee's right to a personal indemnity from the cestnis que trust absolutely entitled, the case of a club trust may be taken. Thus, in *Wise v. Perpetual Trustee Company, Limited*, [1903] A. C. 139, the appellant was a member of a club in Sydney, Australia, called the Cercle Français. He had been a member when certain leasehold premises were taken by the trustees of the club, and remained a member until the club ceased. The trustees were made liable for the rent of these premises, and claimed an indemnity from the members:—*Held*, that their only remedy was against the club (*i.e.*, the trust) property. The feature, said Lord LINDLEY (at p. 149), which distinguishes clubs is “that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised.”

#### ART. LIX.—*Trustee's Right to the Protection of the Court.*

(1) A trustee is entitled, where it is reasonably necessary for his protection so to do, to obtain by originating summons at the expense

of the trust property the direction of the court on any question within rule 3, Order 55, of the Rules of the Supreme Court.

(2) Where such a course is reasonable, the trustees or a majority of them having in their hands or under their control money or securities belonging to a trust are entitled to pay the same into the High Court to be dealt with according to its orders.

(3) Where such a course is reasonable, and the trust property is not capable of being paid into the High Court, a trustee is entitled to institute an action for the administration of the trusts by the court.

Formerly, the only mode in which a trustee could in case of difficulties arising in the construction of the trust instrument or in the execution of the trust obtain the protection of the court, was by an action for the general administration of the trust estate, and advice on any particular point was not given by the court as a rule until all the trustee's accounts had passed the Master. Now a much simpler and cheaper mode of getting the directions of the court is provided by the rule cited in the Article, and though it is the practice in taking out summonses under that rule to apply also under rule 4 for administration "as far as the same is necessary," that is intended merely to give the court a wider jurisdiction as to the order to be made than it would otherwise have. Rule 10 of Order 55 now provides that the court, even when general administration is asked for, need not issue any order or judgment for administration if the questions before it can be properly determined without it.

The matters within rule 3 are (a) any question affecting the rights or interests of the persons claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust; (b) the ascertainment of any class of

creditors, legatees, devisees, next of kin, or others ; (c) the furnishing of any particular accounts by the executors, administrators, or trustees ; (d) the payment into court of any money in the hands of the executors, administrators, or trustees ; (e) the direction of the executors, administrators, or trustees to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees ; (f) the approval of any sale, purchase, compromise, or other transaction ; (g) the determination of any question arising in the administration of the trust.

Payment into court is one of the very few acts which a majority of trustees under a private trust may perform and compel the dissentient minority to accept their decision (see sect. 42, Trustee Act, 1893).

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#### *ART. LX.—Trustee's Right to a Discharge on Complete Performance of the Trust.*

Upon the complete performance of the trusts or on the determination of the trust by the act of the cestuis que trust under Art. LXIII. a trustee is entitled to have a discharge from the cestuis que trust, or on their refusal to give him one to have his accounts taken in court.

As a rule a trustee, unlike an executor, is not entitled to a release under seal (*King v. Mullins* (1852), 1 Drew. 308).

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#### *ART. LXI.—Effect of a Direction or Judgment of the Court on a Trustee's Powers.*

: A direction to a trustee under paragraph (1) of Art. LIX. does not interfere with the powers of the trustee except so far as such

interference may necessarily be involved in the particular relief sought. A judgment in an administration action under paragraph (3) of the same Article does not deprive the trustee of the powers vested in him, but henceforth he can exercise such powers only subject to the supervision and sanction of the court.

The leading case on the effect of an order for administration on the powers of a trustee is *Minors v. Battison* (1876), 1 App. Cas. 428. There a testator left all his property to trustees to hold for the widow for life, and then for the children. Part of the estate consisted of a newspaper, which the will empowered the trustees to carry on during the widow's life. An absolute discretion was given them to sell on the widow's death all the estate, including the newspaper. In 1866 a suit for administration was commenced, in which a decree was made. By an order made in 1870, when the widow was dead, it was declared that it was for the benefit of all parties that the newspaper should not be sold :—*Held*, that after the decree, the trustees, whether their discretion to sell was absolute or not, could not exercise it without the previous sanction of the court.

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A.—PRIVATE TRUSTS (*continued*).

## CHAPTER IV.

## CESTUIS QUE TRUST AND THEIR RIGHTS.

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ART. LXII.—*Position of Cestui que Trust who is a Life Tenant.*

Where a cestui que trust is entitled in possession to be paid the net rents and profits of the trust property for a life or other limited estate—

- (1) the court may, where the trust property is land, in the exercise of its discretion, put him in possession of the land itself or the gross rents, whether the trustee consents thereto or not;
- (2) he may, without the previous consent of the court, bring an action to protect the trust property, and in such a case the court will give him an indemnity out of the trust property, provided the

action was one which, had it been applied to, the court would have authorised.

#### PARAGRAPH (1).

The cestui que trust entitled in possession to a limited interest in the equitable estate cannot claim as of right to be put in possession of the trust property, but the court in the exercise of its discretion will put him in possession provided due securities are given for the protection of the property. Thus, in *Re Hunt, Pollard v. Geake*, [1901] W. N. 144, an equitable life tenant of a freehold farm was put into possession of the rents paid by the lessee of the farm upon giving undertakings to (among other things) keep the farm buildings insured to the satisfaction of the trustees, keep down interest on incumbrances and pay all outgoings, see that the lessee performed the covenants in his lease, pay a person appointed by the court to inspect the property once a year and report to the trustees, etc. (And see *Re Newen*, [1894] 2 Ch. 297.)

#### PARAGRAPH (2). .

The proper course for a life tenant of settled lands to take is to apply for the previous sanction of the court under sect. 36 of the Settled Land Act, 1882. But in case he does not so apply, the court will, in hearing an application, after action brought, for an indemnity for the costs out of the settled property, treat the application as if it were an application for its sanction to the bringing of the action. Mere advice of counsel that the action should be brought is not in itself sufficient to show that the action was proper (*In re Yorke, Barlow v. Yorke*, [1911] 1 Ch. 370). It is to be remembered that the trustees of the settlement may bring an action to protect the trust property, and are entitled in a proper case to an indemnity out of the trust property (see Art. LI.), even though the life tenant did not consent to the bringing of the action (*Stott v. Milne* (1884), 25 Ch. D. 710; *Stra. L. C.* 127).

**ART. LXIII.—Right of Cestui que Trust to Determine the Trust and Discharge the Trustee.**

(1) Notwithstanding any directions contained in the trust instrument, and notwithstanding any rule of law hereinbefore stated, a trustee may be discharged of the duties of his trust and the trust itself determined by the sole cestui que trust, or, if there be more than one, by all the cestuis que trust, provided such sole cestui que trust or all such cestuis que trust is or are (i) *sui juris* (ii) and absolutely entitled, solely or jointly, to the whole equitable ownership of the trust property.

(2) The trust may be determined by the trustee, at the direction or with the consent of the sole cestui que trust or all the cestuis que trust—

- (i) conveying the trust property to the sole cestui que trust or one or more of the cestuis que trust,
- (ii) conveying the trust property to a third person or third persons,
- (iii) himself purchasing the trust property.

(3) Provided that—

- (i) a discharge given by the cestui que trust to the trustee may be set aside where before granting it the cestui que trust was not fully informed of all the material facts bearing upon it, and
- (ii) a sale of the trust property by the cestui que trust to the trustee may be set

aside where the trustee is unable to show that, before the sale, the cestui que trust was fully informed of all the material facts known to the trustee bearing upon it, and that the price he gave for the trust property was, under the known circumstances, fair and reasonable.

#### PARAGRAPH (1).

When a person is not under disability of any kind and is absolutely entitled in equity to trust property, he is entitled to direct the trustees to do what he wishes with such property quite independently of any directions in the trust instrument as to how it is to be used. This rule applies equally to trusts in favour of persons and trusts for charities (*Wharton v. Masterman*, [1895] A. C. 186), but the two commonest examples of its operation are these : (i) Where a settlor settles property subject to a direction that part only of the income shall be paid to the cestui que trust till he attains some age beyond his legal majority—such as twenty-six years. Here if the gift is absolute the cestui que trust on attaining twenty-one can direct the trustees to transfer the settled property to him in spite of the direction in the instrument of trust (*Gosling v. Gosling* (1858), Johns. 265; *In re Williams*, [1907] 1 Ch. 180), and as to gifts to charities corporate or incorporate the same rule applies (*Wharton v. Masterman*, [1895] A. C. 186). (ii) Where money is left to trustees to purchase a life or other annuity for a cestui que trust. Here the cestui que trust can claim the money left for this purpose and decline to have it invested in an annuity (see *Re Ross, Ashton v. Ross*, [1900] 1 Ch. 162).

This rule, it is to be noted, applies only when the cestui que trust is absolutely entitled. Thus in the case of annuities where there is a gift over to another on any attempt of the cestui que trust to alienate the annuity or on his bankruptcy, he is not entitled to claim the capital (*Power v. Hayne* (1869), L. R. 8 Eq. 262). And even

without such restriction on alienation the right to claim the capital may be defeated by directing an annuity to be purchased for the life of the annuitant and, for example, one year more, the last year's income to go into the testator's residuary estate. Here the annuitant is only partly entitled to the annuity, and so cannot claim the capital sum ; but of course, unless subject to disability, he or she may alienate his or her interest in the annuity. It is to be noted, too, that any particular person who is a cestui que trust under a discretionary trust for the benefit of a class—such as A. and his children—is not entitled to any particular part of the trust fund, and so the trust can be determined only by all the cestuis que trust who are to be benefited under the trust joining together and jointly directing the determination of the trust (*Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443). And even then the trust can be determined only if the trustees are directed to apply *all* the property for their benefit. Here the cestuis que trust are jointly absolutely entitled and so come within the rule when they act jointly. A similar discretionary trust for the benefit of one person only comes also, of course, within the rule (*In re Williams*, [1907] 1 Ch. 180).

The rule applies equally—as the above examples show—to simple and special trusts. The only difference is that while simple trusts are usually for the benefit of one cestui que trust only, special trusts are for the benefit almost invariably of a number of cestuis que trust, some of whom are pretty certain to be under some disability, and in any event all of whom must join in determining the trust. The rule applies also where the interests of the cestuis que trust are not all immediate, but successive, *e.g.*, limitation of Blackacre in trust for A. for life and then to his children B., C., and D. equally in fee. Here, if A., B., C., and D. are all *sui juris* they may combine to determine the trust during A.'s life when B., C., and D.'s interests are in remainder just as well as B., C., and D. could after A.'s death combine for the same purpose when their interests would be in possession (*Saunders v. Vautier* (1841), Cr. & Ph. 240). The sole point is whether all the beneficiaries are agreed to determine the trust and are between them absolutely

entitled to the trust property, whether in possession or in succession or alternatively at the discretion of the trustees. Where the possible beneficiaries include the children of any person the rule cannot, strictly speaking, ever be satisfied while such person lives, since the legal view is that no person is ever incapable of having issue ; but as a matter of practice, where the person whose children are possible cestuis que trust is a woman past the age of child-bearing, the court recognises this fact, and permits the persons then cestuis que trust to act as if they were the sole possible cestuis que trust (see *Re Blundell*, [1901] 2 Ch. 221 ; *Re Thornhill*, [1904] W. N. 112).

One of several cestuis que trust who has become absolutely entitled to his share of trust property held in trust for sale with power to postpone its sale, cannot compel the trustees to sell in order that he may receive his share of the proceeds (*In re Horsnaill, Womersley v. Horsnaill*, [1909] 1 Ch. 631).

#### PARAGRAPHS (2) AND (3).

Purchases by a trustee from himself or his co-trustees of the trust property are, as we have seen, always voidable except when they have been made with the sanction of the court or under an express power contained in the trust instrument (see *supra*, Art. XLVIII.). Purchases from the cestuis que trust are not, however, voidable except for cause. Any failure, however, on the trustee's part to disclose to the cestui que trust any matter within his knowledge which would or might influence the cestui que trust's mind as to the bargain will render the sale voidable as against the trustee. The rule is thus stated by Lord CAIRNS in *Thomson v. Eastwood* (1877), 2 App. Cas. 215, at p. 236 : "There is no rule of law which says that a trustee shall not buy trust property from a cestui que trust ; but it is a well-known principle of equity that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all

information was laid before the cestui que trust when it was sold."

Thus, in *Dougan v. Macpherson*, [1902] A. C. 197, A., who was a trustee and a cestui que trust under his father's will, had a valuation made of the trust estate for his own private purpose, namely, for the purpose of obtaining a loan on the security of his share of the estate. Subsequently he bought the share of his brother, who was also a cestui que trust but not a trustee. When he so bought, A. did not disclose to his brother the valuation :—*Held*, that the sale must be set aside. Lord MACNAGHTEN, after approving the dictum of Lord CAIRNS above cited, says, at p. 204: A. "was keeping back information which it was his bounden duty to have conveyed to his cestui que trust. And it does not matter in the least how or under what circumstances the information was gained; if he had that information he was bound to place it at the disposal of his cestui que trust with whom he was dealing."

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#### ART. LXIV.—*Right of Cestui que Trust to follow the Trust Property.*

(1) As long as trust property remains in substance in the hands of a trustee, however often and however improperly its nature or investment may have been altered by him, and whether it is or is not mixed with the trustee's own money, provided when it is so mixed it can be distinguished from his, the cestui que trust is entitled to claim it as against all the world.

(2) When the trustee mixes the trust property with his own moneys in such a way as to make its identification impossible, the court assumes, if he invests the mixed fund, that he intends the investment to be for the benefit of

the cestui que trust, and if he converts any part of such investment or any part of the mixed fund itself to his own use, that he intends so to convert in the first place the part of it which belongs to himself.

(3) Where any part of the trust fund is transferred to a person who is not lawfully entitled to it but who takes it without notice of the breach of trust, the cestui que trust, so long as such part can be distinguished from the receiver's own property, may claim it against the world; but when it cannot be so distinguished he may sue the receiver for the value of it as a debt in equity.

#### PARAGRAPH (1).

The above rule is usually called the right of a cestui que trust to follow the trust property as long "as it is earmarked." It used to be added that money is not earmarked. This, the second part of the rule has now made somewhat misleading. It only amounts to this, that a person taking money from a trustee is not as likely to have notice that it is trust money as a person buying land or other such property, and that it is on the whole harder to discover where money came from than it is with other property. But where it can be distinguished money is just as much within the rule as anything else. No act of a trustee can make trust property part of his estate and therefore liable for his debts, though sometimes his acts make it very difficult to say what part of his estate is and what is not trust property. Where it can be shown that certain moneys are the proceeds of, or certain investments were made with, trust property, the cestui que trust can claim them; where they can be shown to be partly the proceeds of, or partly made with, trust money, the cestui que trust has a lien or charge upon them for the amount of trust money they represent (see *per JESSEL, M.R.*, in *Re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, at p. 708).

The rule is stated in the Article as prevailing against all the world, but in fact it is effective only when the trustee is insolvent. When the trustee is not insolvent, then, in case of breach of trust, the cestui que trust's remedy is the proprietary one stated in the next Article or the personal one stated in Art. LXVIII.

• PARAGRAPH (2).

The leading case on the second part of the rule, and indeed on it all, is *Re Hallett, Knatchbull v. Hallett* (*supra*). There a solicitor having in his possession bonds which he knew to be trust property sold the same and paid the proceeds, £2,200, into his private banking account. Subsequently he drew cheques for his own purposes and from time to time paid into his account further sums. When he died there was a balance of about £3,000, but if he had not paid in the other sums after he paid in the proceeds of the bonds his balance would have been much under £2,200. Now there is a rule called the rule in *Clayton's Case* (1816), 1 Mer. 572, under which it is assumed that where a customer draws cheques upon his banker he intends, where there is no arrangement to the contrary (see *Deeley v. Lloyd's Bank*, [1910] 1 Ch. 648), to draw out first the money he first paid in:—*Held*, by the Court of Appeal, that this rule did not apply in this case. The customer here was trustee of part of the money, and it must be taken, and were he the defendant he would not be allowed to deny it, that he intended to draw out first his own money.

The rule in *Clayton's Case* (*supra*), however, applies as between different cestuis que trust claiming against the same account, there being no reason why the trustee should be assumed to have intended to rob one of them more than another (*Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433). Moreover, if the trustee's balance at the bank is overdrawn, the banker is entitled to discharge the overdraft out of the first money paid in by the trustee unless at the time he had notice it was trust money (*Hancock v. Smith* (1889), 41 Ch. D. 456).

The rule stated in *Re Hallett* (*supra*) has been carried a step further in the case of *Re Outway, Hertslet v.*

*Oatway*, [1903] 2 Ch. 356. There A. and B. were trustees of certain funds. A loan of £3,000 of such funds was in breach of trust made to B. on the security of a reversionary interest belonging to B. B. afterwards went abroad, giving A. a power of attorney to sell this reversionary interest. A. sold it for £7,000, which he paid into his own account : £3,000 of this was, of course, trust money. A. subsequently bought certain shares for over £2,000 and converted the balance of the £7,000 to his own use in such a way that it was irrecoverable. A. died insolvent. A claim was made that B. as trustee was entitled to a lien on the shares bought by A. in respect of the £3,000 trust money :—*Held*, that he was so entitled. When an investment is made out of a mixed fund composed of trust money and the trustee's own money and the rest of the mixed fund is converted to the trustee's own use, it must be assumed that the part converted was the trustee's own money no matter in what order the drawings upon the mixed fund took place.

#### PARAGRAPH (3).

This rule is to be read subject to the rule previously stated (see *supra*, Art. IX.), that a person taking the legal estate in trust property for value and without notice of the trust, gets a title which is good against the cestui que trust, and the rule to be stated later, that a person taking with notice that he is taking in breach of trust is a constructive trustee (see *infra*, Art. LXXXIV.).

The mere transfer of the trust property to a person who takes it innocently, but does not give value for it, vests in such person no title to it in equity, though he takes a good one in law. Accordingly, so long as it is distinguishable it remains in equity the cestui que trust's property. Where it ceased to be distinguishable, an action for its recovery is treated as analogous to an action at common law for money had and received, and is therefore barred by lapse of time in six years after the receipt of the trust money.

Where the person receiving the part of the trust fund to which he is not lawfully entitled is a co-cestui que trust, the money improperly paid to him may sometimes be recoverable after more than six years in an action

for the administration of the trust. Thus, if on taking account it is found that he has received more than he was entitled to in the past, and some assets under the trust are still due to him, the court may deduct from such assets the money which had previously been repaid to him (*In re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502).

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ART. LXV.—*Right of Cestui que Trust to adopt a Breach of Trust.*

Where a trustee by improperly selling or improperly investing trust property, commits a breach of trust, the cestui que trust or all the cestuis que trust jointly, if *sui juris* and entitled absolutely to the trust property, may elect to adopt the transaction and claim all the profits and benefits resulting from it. If they so adopt it the trustee cannot be made liable for breach of trust. Where all or any of them do not or cannot adopt the transaction, the trustee is chargeable with breach of trust.

Where trustees have made an unauthorised investment they are entitled to resell, and can make a good title without the consent of the cestuis que trust, provided all the cestuis que trust have not elected to adopt the investment (*Patten v. Guardians of Edmonton* (1883), 52 L. J. Ch. 787), or provided they are through disability or other cause unable to elect (*Re Jenkins and Randall's Contract*, [1903] 2 Ch. 362). It is usual when trustees resell to make one of the cestuis que trust a party to the sale to show that all the cestuis que trust have not elected to adopt the unauthorised investment, more especially when the investment was in land.

As to the liability of a trustee where his cestuis que trust repudiate an unauthorised investment, see *infra*, Art. LXVIII.

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A.—PRIVATE TRUSTS (*continued*).

## CHAPTER V.

## BREACH OF TRUST.

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ART. LXVI.—*The Property in respect of which a Trustee is Chargeable.*

(1) A cestui que trust can hold a trustee chargeable for breach of trust only in respect of trust property which the trustee himself has actually received or which he might have received but for his wilful default.

(2) The mere joining with his co-trustees in a receipt for the payment or transfer of trust property actually received, not by him but by his co-trustees, will not in itself render a

trustee chargeable in respect of such property (Trustee Act, 1893, sect. 24).

This is merely a statutory rendering of the previous equitable rule, and makes no material alteration of that rule.

The only point to be explained is as to trustees joining in receipts. The receipt of one co-trustee, unlike that of one co-executor, does not discharge a debtor who is paying over trust money. Now frequently it is difficult or impossible for all the trustees to receive jointly trust property, especially when such property is money. In such cases they may properly permit or delegate one of their number to receive it (*Horne v. Pringle* (1841), 8 Cl. & F. 264, at p. 288); and to give the payor a discharge they may join in the receipt given to him acknowledging payment. This is usually called joining for conformity only.

It should be pointed out that allowing a co-trustee to receive trust money does not discharge his co-trustees from their duty to have it, as soon as is reasonably possible, placed under their joint control. See cases cited in note to next Article.

#### *ART. LXVII.—Liability of a Trustee for his own and his Agent's Acts.*

(1) A cestui que trust is entitled to hold a trustee liable for any loss to the trust property resulting from the trustee's breach of trust, whether such loss arose directly—

(i) From the act or omission of the trustee himself, or the act or omission of a co-trustee rendered possible by the trustee's breach of trust;

(ii) From the act or omission of an agent appointed by the trustee (whether a

co-trustee or stranger to the trust), where the duty delegated to such agent was one which could not properly be so delegated;

- (iii) From the act or omission of an agent appointed by the trustee (whether a co-trustee or stranger to the trust), where the duty delegated was one which might have been properly but was in fact improperly delegated.

(2) A duty which may properly be delegated to an agent is in fact improperly delegated where it is delegated to an agent who is not reasonably fitted (a) by character, or (b) by calling, properly to perform it; and a delegation which in fact is proper may become improper where a breach of trust results; (c) from the delegation being continued longer than is reasonably necessary for its proper performance, or (d) from the trustee not within a reasonable time ascertaining by personal inquiry whether the duty has been properly performed.

#### PARAGRAPH (1).

As has already been pointed out (Art. XLI.) (a) a duty of a trustee is an obligation to do or to refrain from doing a certain act; (b) a power of a trustee is a duty to use reasonable care, skill, and prudence in doing or refraining from doing a certain act; (c) the failure to perform a duty is a breach of trust; (d) a trustee is not liable for anything but a breach of trust. In other words, if a trustee performs his own duties and exercises his own powers properly he is liable neither for his own acts nor the acts of his co-trustees or agents. If these propositions are borne in mind, the preceding Article and the following note will be more easily understood.

We have already discussed the duties and powers of a trustee. As we shall see, the trustee's liability for the act of his agent invariably arises out of his own breach of trust. A few examples will show this.

As to (i), the liability of one trustee for his co-trustee's act or omission usually arises through the trustee's failure to perform his first duty—to preserve the trust property (see *supra*, Art. XLIII.). Thus, in *Thompson v. Finch* (1856), 22 Beav. 316, A. and B. were trustees. A. permitted B. to receive trust moneys. There was nothing wrong in this (see preceding Article). But A. also permitted B. to invest them on mortgage in B.'s own name. This was clearly a breach of his duty to have all trust investments made in his and B.'s joint names (*supra*, Art. XLIII., para. 1). The mortgage debt proved irrecoverable and B. became bankrupt:—*Held*, that A. was liable.

*Mendes v. Guedella* (1862), 8 Jur. (n.s.) 878, where his co-trustees permitted one trustee to have access alone to bearer securities, with the result that he converted some of them to his own use; and *Lewis v. Nobbs* (1878), 8 Ch. D. 591, where two trustees agreed that they should hold half each of bearer bonds in which they had invested trust money, are similarly cases of breaches of the duty that co-trustees should have these bonds, like money, under their joint control (see *Re De Pothonier*, [1900] 2 Ch. 529).

As regards (ii), it is hardly necessary to point out that the breach of trust which renders the trustee liable for the acts of his agent is delegating to the agent a duty which he cannot lawfully delegate. What duties a trustee can lawfully delegate are set out in Art. XLIX., *supra*.

As to (iii), the breach of trust is the failure of the trustee to perform the duty of displaying reasonable skill, care, and prudence in exercising the power to appoint the agent.

#### PARAGRAPH (2).

As regards the character and calling of the person appointed agent, in *Re Earl of Lichfield* (1737), 1 Atk.

87, it was held that to delegate the duty of paying dividends to a person whose reputation for honesty was bad was not a proper exercise of a power. (And see *In re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50.) In *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674, it was held that it was not proper to appoint a solicitor to do what was not legal business, namely, the collecting of rent, and the trustees were held liable for the extra expenses thereby caused. In *Robinson v. Harkin*, [1896] 2 Ch. 415, the employment of an outside broker to buy stock was held improper. And see *Fry v. Tapson* (1885), 28 Ch. D. 268, where the appointment of a London surveyor to value a house in Liverpool was held bad, and rendered the trustees liable for a loss due to over-valuation. There the court specifically laid down the principle that the duty delegated to an agent must be one within his ordinary calling.

The particular point on which *Fry v. Tapson, supra*, turned, namely, that the surveyor employed did not reside in the neighbourhood, is now overruled by sect. 8 of the Trustee Act, 1893, which permits a non-resident surveyor to be a proper valuer, provided the trustees reasonably believe that he is so.

As to the length of time the delegation may be continued, see *Wyman v. Paterson*, [1900] A. C. 271. There trustees by their solicitor received money on the payment of a bond, one of the securities of the trust estate. This in itself was a proper proceeding, as we have already seen (*supra*, Art. XLIX.). They, however, left the money in the possession of the solicitor for six months. Then the solicitor became bankrupt and the trust money was lost:—*Held*, that the trustees were liable, as it was unreasonable to continue the delegation so long. And see *Matthews v. Brise* (1843), 6 Beav. 239, and *Robinson v. Harkin*, [1896] 2 Ch. 415. As to not taking reasonable care to see that the duty delegated is performed, see *Bostock v. Floyer* (1865), L. R. 1 Eq. 26. There a trustee properly instructed a solicitor to carry through a mortgage by which certain trust funds were to be invested on security of certain copyhold land. After a time the solicitor forwarded to the trustee a bundle of deeds containing a paper which purported to be a copy

of the court roll admitting the trustee. But there was no receipt for the mortgage money, and it was afterwards discovered that there was no court held on the day of the purported surrender. For many years afterwards the interest was regularly paid. On the death of the solicitor it was found that no mortgage had been made and that he had fraudulently converted the cheque to his own use :—*Held*, that as the trustee had not taken care to see within a reasonable time that the mortgage had been made, he was liable.

The loss of the trust property must, however, be due to the negligence of the trustee. Negligence in itself will not make a trustee liable for the loss if diligence on his part would not have prevented it. Thus, in *Shepherd v. Harris*, [1905] 2 Ch. 310, a trustee (Janvrin) delegated to his co-trustee, who was a stockbroker, the duty of buying inscribed stock on behalf of the trust. It is not usual for a purchaser of inscribed stock to attend personally at the bank to accept the transfer. Janvrin did not so attend, and, after the date when the inscribed stock was supposed to be purchased, was satisfied by the broker trustee's production of what appeared to be a stock certificate for the inscribed stock purchased. As a matter of fact, the broker trustee had not purchased any stock, but had misappropriated the purchase money immediately on receiving it. No inquiries were made by Janvrin until two years later, when the fraud was discovered :—*Held*, that Janvrin was not liable, since, though he was negligent, no diligence on Janvrin's part could have prevented the loss since the trust money was misappropriated immediately after its receipt.

The rule in paragraph (2) is based on specific decisions merely. The real test to decide whether any delegation is a proper one is : is it reasonable? (*Speight v. Gaunt* (1884), 9 App. Cas. 1; Stra. L. C., p. 140). Where, however, the duty is one that can be properly delegated, the burden of showing that the delegation is not reasonable lies on the person impeaching it (*Re Brier* (1884), 26 Ch. D. 238).

The fact that a trustee accepted improperly a share of the commission paid to his co-trustee or agent on the

purchase of stock, will not render him liable for the agent's or co-trustee's act if he was not otherwise liable (*Shepherd v. Harris, supra*; and see *National Trustees Company of Australasia v. General Finance Company*, [1905] A. C. 373).

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ART. LXVIII.—*Measure of a Trustee's Liability for loss Resulting from a Breach of Trust.*

(1) Where a trustee is chargeable with breach of trust the cestui que trust is entitled to recover from him the depreciation of the trust property resulting from the breach, and interest or profits upon the trust property involved in the breach, according to the following rules :

(2) As to depreciation :

- (i) Where the breach of trust is the improper sale or investment of trust property, the cestui que trust can claim either for the actual depreciation of the trust property or for the loss to the trust property consequent on the trustee failing to do what he ought to have done.
- (ii) Where the trustee advanced trust money on loan on security of property which in its nature is a security on which he was entitled to advance the trust funds, he will not be liable for any part of the trust money so advanced which may be lost through the depreciation of the property, if before making the loan he had the property valued by one

whom he reasonably believed to be an able practical surveyor, and he advanced on such surveyor's advice not more than two equal third parts of the value as reported to him by such surveyor (sect. 8, Trustee Act, 1893).

- (iii) Where the breach of trust is an investment of the trust property which is improper because the sum advanced on the security is excessive, the cestui que trust can claim only for the amount by which it is excessive (sect. 9, Trustee Act, 1893).

(3) As to interest :

- (i) In all cases the cestui que trust can claim interest at the rate of 3 per cent. per annum on the amount of the trust property involved in the breach of trust, or in the alternative the interest actually received or which ought to have been received on the property.
- (ii) Where the breach amounted to an attempt on the part of the trustee to appropriate the trust property to his own use or where the trustee used the trust property for his own purposes in trade or speculation, the cestui que trust can claim interest at the rate of 5 per cent. per annum, with yearly or half-yearly rests, or in the alternative an account of the profits actually made upon the trust property.

- (4) A trustee is not entitled to set off the profits made in one improper transaction

against the losses made in another improper transaction.

(5) Where several trustees are liable for the breach, each of them is liable for the whole loss resulting from it ; and they are also all jointly liable.

#### PARAGRAPH (1).

Where the breach of trust consists in the trustee making an improper investment, if the investment was one not authorised by the settlement or by law, he can either sell, in which case if there is a loss on the transaction he is liable for it, and if there is a profit the cestui que trust takes it ; or the trustee can take over the investment himself upon replacing the trust funds (*Fry v. Tupson* (1885), 28 Ch. D. 268). If, however, the investment was authorised and was improper only because he advanced too much money on the security, he seems to have no option to take it over, and it can be realised whether he wishes it or not (*Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351 ; *Re Lake, Ex parte Howe Trustees*, [1903] 1 K. B. 439).

Where no loss, direct or indirect, arises through a breach of trust, though the court may think the breach justifies the removal of the trustees from the trust, no damages of any kind can be recovered from them. As pointed out at p. 9, *supra*, the Court of Chancery never gave damages : it merely made the wrongdoer account for what he received or should have received.

For an example of a breach of trust which occasions no loss to the cestui que trust, see Art. XLV., para. 3, *supra*.

All breaches of trust for which it is sought to hold a trustee liable must be alleged in the statement of claim and proved at the trial. The rule applicable to cases of wilful default, namely, that on proof of one instance of wilful default at the trial, an account will be ordered on the footing of wilful default (see *infra*,

Art. CLXXXIV.), has no reference to active breaches of trust (*In re Wrightson*, [1908] 1 Ch. 789; Stra. L. C., p. 175).

#### PARAGRAPH (2).

(i) Thus, in *Re Massingberd, Clark v. Trelawney* (1890), 63 L. T. 296, trustees sold Consols for the purpose of investing the trust money on a contributory mortgage—that is, a mortgage in which the mortgage money is advanced in parts by several lenders—which is an unauthorised security. Subsequently they called in the mortgage and there was no loss on the transaction. But meanwhile the price of Consols had gone up:—*Held*, that since the sale of the Consols for the purpose of investing the proceeds in a contributory mortgage was a breach of trust, the trustees were bound to replace the Consols sold. This was a loss not of the trust property but to the trust property arising through the trustees not doing as they should have done.

In the same way, where the trustees are directed by the trust instrument to invest in some particular security and no other, the trustees may be liable for profits which would have been gained to the trust property if they had obeyed this direction, even though there is no direct loss of the trust property. But since the Trustee Act, 1893, now gives a choice of investments and a power to vary investments, except where these powers are expressly excluded by the trust instrument, these cases are not very common now.

(ii) Section 8 of the Trustee Act, 1893, imposes no obligation on trustees to employ a surveyor to have the property valued. What it does is to provide that if trustees do employ a competent surveyor, and advance only two-thirds of the value as reported by him, and if he advises the advancee, they will not be liable for any loss subsequently accruing to the trust property (*Palmer v. Emerson*, [1911] 1 Ch. 758; and for a consideration of the duties of surveyor and trustee under this section, see *In re Solomon*, [1912] 1 Ch. 261).

(iii) Formerly, where a trustee advanced too large a sum on a security which would have been in every way

a proper investment for a smaller sum, if there was loss the trustee was liable for it all. Now, however, he is liable only for the balance over and above the amount for which it was a proper investment. Thus, A., wishing to advance trust money on the security of Blackacre, retains B., a competent surveyor, to value Blackacre. B. values Blackacre at £9,000. Now on this valuation Blackacre is a proper security for £6,000. Say A. advances £7,000. If on sale Blackacre realises only £5,000, A. will not be liable for the £2,000 lost, but only the £1,000 he advanced over the £6,000.

It is to be remembered that the security must be in every other way than merely in value a proper security before the trustee is entitled to the benefit of the Act, and it lies on the trustee to prove this (*Re Turner, Barker v. Irimey*, [1897] 1 Ch. 536, at p. 541).

### PARAGRAPH (3).

Thus, in *Re Davis, Davis v. Davis*, [1902] 2 Ch. 314, A. and B. sold certain trust investments to the value of £6,400, and paid the same into the trust account at the L. and W. Bank. The bank only allowed  $1\frac{1}{2}$  per cent. on deposits, and there was no proper security to be obtained which would pay more than 3 per cent. A. was member of a firm which had an account at the L. and W. Bank. This account was overdrawn to the extent of £20,000, fully secured, the interest payable being  $3\frac{1}{2}$  per cent. A. and B., in good faith, advanced the £6,400 to the firm at  $3\frac{1}{2}$  per cent. as a temporary investment until a proper investment could be obtained, and the firm used the money to reduce their overdraft. Afterwards the £6,400 was repaid to the trustees :—*Held*, that the trustees were liable for interest at the rate of 5 per cent. per annum for the period during which it was lent to A.'s firm. FARWELL, J., in delivering judgment, cited the following from the judgment of *Vyse v. Foster* (1872), L. R. 8 Ch. 309, at p. 329, which, he said, is still a correct statement of the law: “If an executor or trustee make profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust

money in business, he must account for the profits made by him by such employment in such business ; or, at the option of the cestui que trust, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent."

#### PARAGRAPH (5).

See *Edwards v. Hood-Barris*, [1905] 1 Ch. 20, where it was held by KEKEWICH, J., that although a co-trustee has paid a part of the loss arising from a breach of trust, the cestui que trust may still prove for the whole loss—*i.e.*, for loss that has ceased to be loss—against the estate of a co-trustee who is insolvent.

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#### ART. LXIX.—*Right to Contribution towards Loss through Breach of Trust as between Co-trustees.*

Where as against the cestui que trust several co-trustees are each liable for the whole loss resulting from a breach of trust, as between themselves each is entitled to call on the others to contribute equally towards such loss, even though the moral responsibility of all for the breach is not equal : Provided that :

- (1) Where the breach is fraudulent and all the co-trustees are parties to the fraud, there is no right of contribution.
- (2) Where one of the trustees is, or subsequently to the breach becomes, himself a cestui que trust [and he receives an exclusive benefit from the breach], his interest in the trust property is, as between the trustees, primarily liable for the loss.

- (3) Where one of the trustees caused the loss either (i) by his personal fraud, or (ii) by his improper advice, he being a person on whose advice the other trustees were entitled to rely, he may be held liable to indemnify his co-trustees.
- (4) As regards the limitation of actions, the right to contribution between co-trustees is a simple contract debt, but the period of limitation does not begin to run until the trustees are made liable for the breach of trust.

Where all the trustees were party to a breach of trust, the liability of each to contribute continues after his death, even though no loss occurred during his life, and even though his personal representative could not be sued for the loss. Thus, in *Jackson v. Dickinson*, [1903] 1 Ch. 947, A. and B., trustees, in breach of trust invested trust funds in partly paid-up shares. Some years after A.'s death, B., who had attempted but failed to dispose of the shares, had, on the company being wound up, to pay a call of £800 upon them :—*Held*, that A.'s estate was liable to contribute £400 towards this call, although the liquidator could not have sued his personal representatives for it or any part of it.

And where the deceased trustee's estate is insolvent, and in consequence the surviving trustee has to pay all the loss due to the breach, if costs out of the trust estate are given to the surviving trustee and the representatives of the other, the surviving trustee is entitled to a lien on the costs given the other's representatives (*Fletcher v. Green* (1864), 33 Beav. 426).

#### PARAGRAPH (1).

This is simply an application of the common law rule that there is no contribution between tortfeasors.

## PARAGRAPH (2).

Thus, in *Chillingworth v. Chambers*, [1896] 1 Ch. 685, A. and B. were trustees under a will, under which A.'s wife was entitled for her separate use to an undivided fifth share of the trust funds. A. and B. invested on inadequate securities £8,650 of the trust money at the rate of 5 per cent. per annum. These investments were made at four different times. After the first two were made A.'s wife died, and he became entitled to her share. In an administration action the securities were sold, and realised in all £7,070, and thereupon an order was made declaring A. and B. jointly and severally liable for the balance, *i.e.*, £1,580. In the result, all this sum was made good out of A.'s share. A. thereupon claimed that B. should contribute half of the £1,580, or in the alternative half of the loss on the investments made before A. became a cestui que trust through his wife's death:—*Held*, that A. was not entitled to any contribution from B. KAY, L.J., in delivering judgment, said: “A trustee who, being also a cestui que trust, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received” (p. 707). Neither of the other Lords Justices (LINDLEY and SMITH) limited the rule to cases where the trustee-cestui que trust obtained an exclusive benefit. And see *In re Horne, Wilson v. Coxe-Sinclair*, [1905] 1 Ch. 76, where a trustee, who was also a cestui que trust, and had overpaid his co-cestuis que trust, was held not to be entitled to recover the overpayment.

But the loss must have occurred in connection with the same trust under which the trustee was a cestui que trust. Thus, in *In re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662, two trusts arose under the same instrument with the same trustees but different cestuis que trust. Under one trust, A., one of the trustees, was also a cestui que trust. A. made default in the other trust:—*Held*, that his share in the first trust could not be appropriated to cover the loss in the second trust.

Further, if the trustee guilty of the breach of trust becomes bankrupt, if the new trustees appointed in his

place accept a composition along with the other creditors in full discharge of the trust debt, their right to retain his share of the trust fund is lost (*In re Sewell, White v. Sewell*, [1909] 1 Ch. 806).

#### PARAGRAPH (3).

The most usual cases of one trustee being entitled to an indemnity from another trustee for a breach of trust for which both are chargeable are where the other trustee has in breach of trust obtained possession of the trust property and converted it to his own use (*Baynard v. Wooley* (1855), 20 Beav. 583); and where he has acted as solicitor to the trust and his co-trustee relied upon his advice on matters of law (*Lockhart v. Reilly* (1856), 25 L. J. Ch. 697, and see cases considered, *Bahin v. Hughes* (1886), 31 Ch. D. 390). The second condition—that the trustee claiming an indemnity relied on the solicitor-trustee's advice—is necessary to enable him to succeed. In the words of KEKEWICH, J., in *Head v. Gould*, [1898] 2 Ch. 250, at p. 265: No "judge ever intended to hold that a man is bound to indemnify his co-trustee against loss merely because he was a solicitor, when the co-trustee was an active participator in the breach of trust complained of, and is not proved to have participated merely in consequence of the advice and control of the solicitor." As to indemnity as to costs incurred through one trustee's negligence, see *In re Linsley, Catley v. West*, [1904] 2 Ch. 785.

#### PARAGRAPH (4).

Thus, in *Robinson v. Harkin*, [1896] 2 Ch. 415, A. and B. were trustees of a marriage settlement. Trust funds to the amount of £2,500 were paid to them by a cheque made payable to their joint order. A. indorsed this cheque and sent it on to B. B. handed it to an outside broker, C., with directions to buy certain stock. C. bought stock as directed to the value of £1,500. C. never invested the balance, but from 1885, when he received the money, till 1888, he continued to send cheques each half year in respect of dividends on undelivered stock. After that date nothing was recovered

from him in respect either of interest or principal, and eventually he became insolvent. In 1896 A. brought an action against B. to make him liable for the loss. B. denied his liability, and in the alternative claimed contribution from A. A. pleaded the Statute of Limitations and sect. 8 of the Trustee Act, 1888 (see *infra*, Art. LXXI.) :—*Held*, that the Statute of Limitations did not begin to run as between the co-trustees until their liability became fixed, *i.e.*, until the claim of the cestuis que trust became, by the judgment of the court, established against the trustees, and that as A. was in *pari delicto* with B., he was liable to contribute.

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ART. LXX.—*Duration of a Trustee's Liability to the Cestui que Trust.*

(1) Subject to the exceptions contained in the three succeeding Articles, a trustee's liability to the cestui que trust for loss resulting from breach of trust continues until the cestui que trust's right of action is lost, either—

- (i) through his continued acquiescence in the breach, or
- (ii) by his executing a release of his right of action.

(2) Acquiescence or release bars the action only when—

- (i) the cestui que trust in question is *sui juris*,
- (ii) has full knowledge of the facts, and
- (iii) is not coerced or unduly influenced in giving his acquiescence or release.

(3) A cestui que trust who, being *sui juris*, consents to or concurs in a breach of trust, is

not entitled to sue the trustee in respect of such breach.

#### PARAGRAPHS (1) AND (2).

It was always a principle of equity that the Statutes of Limitation, neither directly nor by analogy, ran in respect of breaches of express trusts. The court was entitled at any period after the breach to give the cestui que trust relief against the trustee. The reason of this was that a trustee who had converted trust property to his own use, or failed to get in trust property by his own wilful default, or improperly disposed of trust property, could not set up his own breach of trust as a defence against the action of the cestui que trust, and so he was always treated as having still in his possession the trust property which he should have had in his possession (*Horenden v. Lord Annesley* (1806), 2 Sch. & L. 607). This rule, which is now modified by the Trustee Act, 1888 (see next Article), does not apply to those constructive trusts which arise not out of any breach of confidence on the part of a person occupying a fiduciary position, but by way of ordinary contract (see Art. LXXXVI., *infra*; *North American Land and Timber Company, Limited v. Watkins*, [1904] 1 Ch. 242).

It was also, however, a principle of equity that delay defeats equity, or, as it is sometimes put, *Vigilantibus non dormientibus aequitas subrenit*. If a cestui que trust who is *sui juris* and fully seised of all the facts in connection with a breach of trust, allows a long time to pass without taking action, though his action is not barred, the court will refuse him relief. This principle applies not merely to actions against trustees, but to all equitable actions. It and the nature of a binding release will be considered in the section dealing with Estoppel, Acquiescence and Release.

#### PARAGRAPH (3).

This is merely an application of the common law doctrine, *Volenti non fit injuria*. Where a person consents to an unlawful act he cannot afterwards sue the wrongdoer for it. We have seen how this operates

as regards the right of contribution between trustees both guilty of breach of trust. As an example, in *Nail v. Punter* (1833), 5 Sim. 555, the husband of a cestui que trust who had a life interest in the trust funds and a power of appointment in remainder, induced the trustees to pay to him part of the trust funds. The cestui que trust sued the trustees for breach of trust. While the action was pending she died, and by her will appointed the trust funds to her husband. He thereupon sued the trustees for breach of trust. The action was dismissed.

Where a trustee who has been induced by the life tenant of the trust property to commit a breach of trust which results in loss has replaced the loss, he is entitled during the life of the life tenant to receive the income of the money he has replaced. This is altogether independent of the power given by sect. 45 of the Trustee Act, 1893, to impound the life tenant's income to compensate a trustee (*Fletcher v. Collis*, [1905] 2 Ch. 24; Stra. L. C. 163).

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#### **ART. LXXI.—*Limitation of Actions by Cestui que Trust for Breach of Trust.***

- (1) The Statutes of Limitations are a good defence to an action against a trustee for breach of trust except where the action
  - (i) is for fraudulent breach of trust and the trustee who pleads the Statutes was a party to the fraud, or
  - (ii) is to recover trust property or its proceeds still retained by the trustee who pleads the Statutes, or
  - (iii) is to recover trust property which the trustee who pleads the Statutes received and converted to his own use.

(2) The period of limitation is six years, and it begins to run

- (i) as regards actions concerning interests in possession at the date of the breach, from such date;
- (ii) as regards actions concerning interests in reversion at the date of the breach, from the time such interests vested in possession.

(3) A cestui que trust whose claim is barred by lapse of time is not entitled to any benefit through an action brought by a cestui que trust whose claim is not so barred.

(4) A married woman, even though her interest in the trust property is subject to a restraint on anticipation, is not a person under disability within the Statutes of Limitations for the purposes of this Article.

This is a summary of sect. 8 of the Trustee Act, 1888—which with sect. 1 is all that remains unrepealed of that statute since the Trustee Act, 1893.

A judicial trustee is not entitled to the benefit of this section (*Re Cornish*, [1896] 1 Q. B. 99).

#### PARAGRAPH (1).

The rule that time does not run in respect of breaches of express trusts was to a certain extent modified previously by sect. 25 of the Real Property Limitation Act, 1874. By that section money or legacies charged on land and secured by an express trust were to be recoverable only within the same time as if there were not any such trust. This, however, applied only to the remedy against the land, not the personal remedy against the trustee (*Banner v. Berridge* (1881), 18 Ch. D. 254).

On the other hand, the effect of sect. 8 of the Trustee Act, 1888, is to take completely out of the rule that time does not run in respect to breaches of express trusts all breaches save those excepted by it. Thus, in *Re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176, three executors were appointed trustees of A.'s will. The trusts of the will were to convert and invest A.'s estate and pay the income to B. for life and on B.'s death to divide it into four equal parts, one of which was to be settled on C. for life, with remainder to her children, and the other three parts to be taken by the three trustees respectively. On B.'s death the trustees divided the trust estate, but instead of settling C.'s share as directed by the will they paid it over to her absolutely. They kept the three remaining parts. More than six years after C.'s death one of her children brought an action for breach of trust:—*Held*, that as the trustees had taken out of the trust estate no more than they were entitled to take, and as the payment to C. was not fraudulent, they were entitled to the protection given by sect. 8, and the action was dismissed (and see *How v. Earl Winterton*, [1896] 2 Ch. 626). But a trustee who was also an annuitant under the trust and who paid himself his annuity without deducting income tax (as should have been done) was held not to be within sect. 8 (*In re Sharp, Ricketts v. Ricketts*, [1906] 1 Ch. 793).

In order that a breach of trust may be fraudulent within the section the fraud alleged must be the defendant's. Thus, in *Thorne v. Heurd*, [1895] A. C. 495, A. was first mortgagee of Blackacre, and B. was second mortgagee. A., in exercise of his power of sale, retained C., a solicitor, to conduct the sale of Blackacre. There was a surplus, of which A. became trustee for B. C., however, fraudulently represented to A. that B. had authorised him to receive such surplus, and A. let him retain it. Thirteen years later C. became bankrupt:—*Held*, that as far as A. was concerned the breach of trust was not fraudulent, nor had A. "retained" the trust money within sect. 8, and therefore he was entitled to the protection of the statute.

Further, the payment of interest on trust property which has been lost through a fraudulent breach of trust, is no acknowledgment of the possession of the trust property by a trustee who was at the time he made such

payment unaware that the trust property had been lost, or that a breach of trust had been committed by his co-trustee (*In re Fountaine*, [1909] 2 Ch. 382).

#### PARAGRAPH (2).

It is very uncertain whether there are any breaches of trust to which any other period of limitation than six years applies, though sect. 8 does not apply that period to all breaches of trust, but only to actions for the recovery of money or other property to which no existing statute of limitation applies (*How v. Earl Winterton*, [1896] 2 Ch. 626).

Where the breach consists in the improper investment (*Re Somerset, Somerset v. Earl Poulett*, [1894] 1 Ch. 231) or improper disposal (*Thorne v. Heard*, [1895] A. C. 495) of trust moneys, in the absence of fraud time begins to run from the improper transaction, not from the date of the loss.

#### PARAGRAPH (3).

Thus, A., a trustee for B. for life and then for B.'s children equally, invests the trust funds in a speculative security in 1895. In 1904 the funds are in consequence lost. B. is barred by the statute from suing A. for the breach in 1895. B.'s children, however, are not barred. If they bring an action for breach of trust A. will be compelled to replace the trust funds. But B. will not be entitled to the income, which will belong to A. until B.'s death (*Collings v. Wade*, [1896] 1 I. R. 340).

#### PARAGRAPH (4).

Before this enactment a married woman under restraint upon anticipation did not lose her right of action either by lapse of time or release, or even if she herself had induced the trustee to commit the breach (see *Fyler v. Fyler* (1841), 3 Beav. 550, at p. 563). This enactment allows time to run against her when her interest is in possession, and under the following Article her interest in the trust property may be impounded for the purpose of contributing to the liability of a trustee who, at her instigation, has committed a breach of trust.

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ART. LXXII.—*Discretion of Court to Impound the Interest of a Cestui que Trust, Party to a Breach of Trust.*

Where a trustee commits a breach of trust at the instigation or request or with the written consent of a cestui que trust, the court may, if it thinks fit, impound the interest of such cestui que trust in the trust property, or any part of it, by way of indemnity to the trustee.

This power applies even where the cestui que trust is a married woman without power of anticipation.

This is a summary of sect. 45 of the Trustee Act, 1893, which replaces sect. 6 of the Trustee Act, 1888.

A consent must be in writing to come within this section, but an instigation or request need not be (*Griffith v. Hughes*, [1892] 3 Ch. 105).

In order to make the instigation, request, or consent of the cestui que trust an instigation, request, or consent within the section, it must be shown that the cestui que trust knew that the act which he requested or consented to amounted necessarily to a breach of trust (*Re Somerset, Somerset v. Earl Poulett, supra*). And though there is no rule that the trustees must be deceived or misled by the cestui que trust before the court will impound the interest of the cestui que trust for their indemnification (*Bolton v. Curre*, [1895] 1 Ch. 544), still, where the cestui que trust is a married woman, the court will require a strong case to be made out before it will take this course (see *Sawyer v. Sawyer* (1885), 28 Ch. D. 595; but see also *Molyneux v. Fletcher*, [1898] 1 Q. B. 648).

ART. LXXIII.—*Discretion of Court to Relieve Trustee liable for Breach of Trust.*

If it appears to the court that a trustee who is liable for a breach of trust has acted honestly and reasonably and ought fairly to be excused, the court may relieve him either wholly or partly from personal liability for the breach.

This provision was introduced by sect. 3 of the Judicial Trustees Act, 1896.

In the words of ROMER, J., in *In re Kay, Mosley v. Kay*, [1897] 2 Ch. 518, at p. 524, each case must be dealt with according to its own circumstances. Accordingly, examples of cases that have been held to come within this section are of little use and may prove misleading. One or two points, however, may be laid down on which the court is likely always to lay weight. (1) A trustee is not justified in paying away trust funds after a legal claim has been made by other persons, merely because he is advised the claim will not succeed (*In re Kay, Mosley v. Kay, supra*). (2) A trustee does not act reasonably in allowing his co-trustee to conduct, without inquiry on his part, the business of the trust (*In re Turner, Barker v. Irimey*, [1897] 1 Ch. 536); (3) nor in accepting the valuation of property for the purpose of advancing trust money on the security of it, not from a valuer appointed by himself, but from one appointed by the mortgagor (*In re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583); (4) nor in acting in plain breach of the trust instrument, even though his solicitor advises such a course (*In re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328). But where the trustee is a layman and the directions in the trust instrument might reasonably mislead him as to his legal duties, he will not be held liable if he acted honestly on a false interpretation of these (*In re Mackay, Griesemann v. Carr*, [1911] 1 Ch. 300).

Further, a trustee must, to obtain the protection of the statute, not merely act reasonably and honestly; he must

act in such a manner that he ought fairly be excused. Where a trustee is remunerated for his services the court will be very reluctant to hold that he ought fairly to be excused (*National Trustee Company of Australasia v. General Finance Company*, [1905] A. C. 373).

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#### ART. LXXIV.—*Criminal Liability of Fraudulent Trustee.*

Besides the quasi-criminal liability to be attached and committed to prison for contempt of court on failure to pay into court trust money ordered so to be paid,

- (1) A trustee who, with intent to defraud, converts any trust property to his own use, or to any other purpose than the use of the cestui que trust, or destroys any of it, is guilty of a misdemeanor, and is liable on conviction to penal servitude for seven years.
- (2) No prosecution can be commenced without the sanction of the Attorney-General, or, when that office is vacant, of the Solicitor-General.
- (3) Where civil proceedings have been taken against the trustee, the person who took them cannot commence criminal proceedings against him without the sanction of the judge who heard the civil proceedings.
- (4) Criminal proceedings against a trustee in no way affect his civil liability (Larceny Act, 1861, sects. 80 and 86).

As we have seen, attachment and committal were originally the sole mode of enforcing equitable decrees

and they remain still a very usual way of enforcing judgments of the High Court in equitable matters.

In the case of defaulting trustees an order to pay into court or to pay to the cestui que trust—not an order that the cestui que trust shall recover (*In re Oddy*, [1906] 1 Ch. 93)—is constantly so enforced where the trustee has or ought to have the trust money in hand (Debtors Act, 1869, sect. 4 (3)). Where the part of the trust estate which the trustee has failed to account for is a debt which was due by the trustee himself to the settlor before the trust was constituted, there the trustee will be held to have paid the debt to the trust estate if it can be shown that he was in a position since he became trustee to have paid it (*In re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697). In order that a writ of attachment may issue, as a rule, the order for payment must be served personally on the trustee or proof must be given that he knows of the order and is evading service of it (*In re Tuck, Murch v. Loosemore*, [1906] 1 Ch. 692).

Where the cestui que trust has elected to proceed personally against the trustee and not against him in his representative capacity, and has got an order for payment of the debt arising from the breach of trust on which he is entitled to issue execution on the trustee's goods, the relationship of trustee and cestui que trust is at an end, and the remedy by attachment under sect. 4 (3) does not arise (*In re Thomas, Sutton, Carden and Company, Limited v. Thomas*, [1912] 2 Ch. 348).

**SECTION I.—DECLARED TRUSTS (*continued*).****B.—CHARITABLE TRUSTS.**

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**ART. LXXV.—*The Meaning of “Charitable Purposes.”***

Trusts for charitable purposes are :

- (i) trusts for the relief of poverty ;
- (ii) trusts for the advancement of education ;
- (iii) trusts for the advancement of religion ; and
- (iv) trusts for other purposes beneficial to the community, not falling under any of the preceding heads, and not being for the purposes merely of sport or hospitality.

The above definition of charitable purposes is taken almost verbatim from the judgment of Lord MACNAGHTEN in *Commissioners of Income Tax v. Pemsel*, [1891] A. C. 531, at p. 583. Perhaps no better definition is possible. At the same time, the fourth head is very vague. With regard to it I think it may be laid down that, while no trust can be a charitable trust which is not at least intended

to be for the public benefit, yet a trust for the public benefit may not be a charitable trust, and a charitable trust may be one which confers benefits only on certain particular individuals. A case or two will render this proposition clearer.

Thus a trust for the suppression of vivisection is a good charitable trust, because the object which the settlor intended to advance is kindness to animals, which is a good charitable purpose, and this though the court is of opinion that the suppression of vivisection is more likely to be for the disadvantage than for the benefit of the public (*In re Foreaux*, [1895] 2 Ch. 501).

Again, a trust for the advancement of a purpose which is for the public benefit, is not a charitable trust when the object of it is sport, such as yachting, not charity (*In re Nottage*, [1895] 2 Ch. 649). On the other hand, a trust for the settlor's poor kindred descendants of A., though it can confer benefits upon particular individuals only, yet is a good charitable trust, since it is for the public benefit that every class of the poor should be provided for (*Gillam v. Taylor* (1873), L. R. 16 Eq. 581). It may be added that the public to be benefited may be the public of a foreign country. Thus a trust for the poor of a German town is a good charity (*Freund v. Steward*, W. N. (1893) 161).

These cases will show that the vagueness of the fourth purpose stated in the Article arises from the nature of the subject-matter (see *In re Good*, [1905] 2 Ch. 60; *In re Sidney*, [1908] 1 Ch. 488).

There is a definition, or rather an enumeration, of charitable purposes contained in the preamble of 43 Eliz. c. 4, which is repeated in the Mortmain and Charitable Uses Act, 1888, sect. 13. It has, however, never been held to be exhaustive.

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### ART. LXXVI.—*Principles Applicable to Charitable Trusts.*

Subject to the limitations contained in the following Articles, the principles applicable to declared private trusts apply equally to charitable trusts.

Thus, omitting certainty as to the objects of the trust, which is dealt with in the next Article, certainty as to the intention to declare a binding trust and certainty as to the property to be bound, are as strictly insisted upon in charitable as in private trusts. Indeed, most failures of charitable trusts arise owing to uncertainty on the latter point. Thus, in *In re Macduff*, [1896] 2 Ch. 451, a testator left a legacy in trust for “charitable or philanthropic purposes” in perpetuity. If “or philanthropic” had been omitted the trust would have been good, as the words “charitable purposes” would have then applied to the whole fund and they would have sufficiently defined the objects of the trust. But there are philanthropic objects which are not charitable in the legal sense, and since there was no indication as to what portion of the fund was to be devoted to charitable objects and what portion to philanthropic objects, and since the trust for philanthropic purposes—being a private trust—failed as transgressing the rule against perpetuities (see *infra*, Art. LXXVIII.), and further being a private trust it should but did not satisfy the third certainty—certainty of object—was bad, it was held that the whole trust failed for uncertainty. (*Cf. In re Best*, [1904] 2 Ch. 354, where the words “charitable and benevolent institutions” were held to be sufficient, and *In re Sidney*, [1908] 1 Ch. 488, where a trust for “charitable uses or emigration uses” was held bad.) Where the trustee is given a discretion as to the apportionment of the trust fund between charitable and other definite purposes, the trust will not fail for uncertainty, whether he exercises his discretion or not. If he does not exercise it, the court will, and, on the principle that equality is equity, will divide the trust fund equally between the different objects (*Salisbury v. Denton* (1857), 2 K. & J. 529).

As to the need for certainty as to the settlor intending to declare a binding trust, see *In re Pitt-Rivers, Scott v. Pitt-Rivers*, [1902] 1 Ch. 403, the facts of which are set out at p. 77, *supra*.

There are elaborate provisions in the Charitable Trusts Acts, etc., relating chiefly to the administration of the property of charities, which do not apply to private trusts. These, however, have nothing to do with equitable principles, with which alone this work deals, and so they will be referred to only incidentally.

Formerly other differences existed, such as marshalling assets in favour of charities. These have been superseded by the Mortmain and Charitable Uses Acts, 1888 and 1891 (see *infra*, Art. LXXIX.).

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#### ART. LXXVII.—*Certainty as to the Objects of a Charitable Trust.*

(1) To sustain a trust for charitable purposes it is not necessary that the settlor should set out a specific object to be benefited by the trust. Whether he does set out a specific object or not, the court will hold that the trust is sufficiently declared if it can gather from the whole trust instrument that, in any event the trust property should be applied for charitable purposes. Such an intention is called a *general intention of charity*.

(2) Where a specific object is set out and such object was in existence when the trust instrument was executed but ceased to exist before the trust came into operation or where the object set out was when the trust came into operation incapable of performance, the court will not hold that any general intention of charity is disclosed and the trust will fail.

(3) Where a specific object is set out if such object was in existence at the date when the trust instrument was executed and also at the date when the trust came into operation but failed afterwards, or if there was no such charitable object in existence at the date when the trust instrument was executed; or where the settlor merely declares that the trust is for charitable purposes; the court will infer a general intention of charity, and the trust will be good.

(4) Where the trust instrument discloses a general intention of charity but no specific charitable object is indicated or the specific charitable object indicated fails or does not exhaust the trust property, then the court will proceed thus: It will itself declare the specific charitable objects for which the trust property, or the surplus of it, is to be held. In so doing, it will, where a specific charitable object not capable of fulfilment or not exhausting the trust property is indicated, endeavour to carry out this purpose as nearly as is possible. This is called carrying out such purpose *cy-près*.

#### PARAGRAPH (2).

Thus where a testator left a legacy to "the rector for the time being" of a Roman Catholic seminary, which ceased to exist before the testator died, it was held that the legacy was in trust for the seminary and lapsed (*In re Rymer*, [1895] 1 Ch. 19). And in *Bute's Trustees v. Bute (Marquis of)* (1905), 7 F. 49, a testator left a legacy to build certain churches which were to be conveyed to the Roman Catholic bishops of the places where they were built subject to certain conditions. The bishops, however, declined to accept the churches subject to the conditions: —*Held*, that the legacy lapsed into the residue of the testator's estate, on the ground that the performance of the trust was impossible. And see *In re University of London*, [1909] 2 Ch. 1.

## PARAGRAPH (3).

Thus a testatrix by her will left a legacy in trust for "the following religious charities." Then followed a blank, in which, no doubt, the testatrix had intended to insert the names of the particular charities to be benefited : —*Held*, a sufficient indication of the object of the trust, and therefore a good charitable trust (*Re White*, [1893] 2 Ch. 41). Again, in *In re Hustable, Hustable v. Crawfurd*, [1902] 2 Ch. 793, the words of the trust were "for the charitable purposes agreed upon between us" : —*Held*, a sufficient declaration of trust, and evidence was admitted to show what the particular trusts were (see *supra*, p. 62 ; and cf. *In re Hetley*, [1902] 2 Ch. 866). But of late where the trust is by will and there is only a very vague and general description of the charitable objects and a very wide discretion is given to the trustees to select the actual charities to be benefited, the court has held that the trust fails for uncertainty on the ground that under a will such as this the real disposition of the testator's property is made by the trustees and not by the testator (see *Grimond v. Grimond*, [1905] A. C. 124). But though this is a decision of the House of Lords it can scarcely be taken as establishing any principle and indeed it is of doubtful value (see *Arnott v. Arnott*, [1906] 1 I. R. 127 ; *In re Pardoe*, [1906] 2 Ch. 184 ; but cf. *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337).

When the trust instrument is a will, questions of difficulty constantly arise as to whether the testator has indicated a general intention of charity, though none is expressed, on failure of his intention of benefiting the specific charity indicated by him. If the specific charity intended to be benefited is a definite institution—e.g., "£1,000 in trust for Dr. B.'s Hospital"—and the institution ceases to exist before the testator dies, then the gift fails absolutely. But where the specific institution survives the testator, but the benefit intended cannot be carried out in precisely the same mode as the testator intended, the court usually implies a general intention of charity, and has the intention of the testator carried out *cy-près* (see *Re Mann, Hardy v. Attorney-General*, [1903] 1 Ch. 232). Where the charit-

able intention relates not to an existing but to a future institution, such as a soup kitchen to be established in a certain parish (*Briseoe v. Jackson* (1887), 35 Ch. D. 460), or a church to be built in a certain district, or to some supposed institution which in fact never existed (*In re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; *In re Webster, Pearson v. Webster*, [1912] 1 Ch. 107), the court is not inclined to let the difficulty of carrying out, or the improbability that it will ever be possible to carry out, the testator's intention lead to the failure of the gift.

It should be added that once a trust fund has become devoted to charitable purposes the subsequent failure of such purposes will not put an end to the trust. It will in this case be invariably carried out *cy-près* (see *Smith v. Kerr*, [1902] 1 Ch. 774, *infra*, p. 195).

#### PARAGRAPH (4).

As to what is meant by *cy-près*, three points may be noticed. The first is that the new purpose must be in the nature of the particular purpose intended by the settlor (see *Re Prison Charities* (1873), L. R. 16 Eq. 129). The second is that it is only permitted to look at the other charitable objects which the settlor intended to benefit by other gifts contained in the settlement, when it is impossible to carry out any charitable purpose in the nature of that for which he made the particular gift (*Attorney-General v. Ironmongers' Company* (1840), Cr. & Ph. 208; and see *Smith v. Kerr*, *infra*, p. 195). The third is that where an object is clearly indicated by the settlor which is capable of being carried out, the fact that the court or Charity Commissioners think that a different mode of applying the trust funds would be more beneficial to the community is no ground for disregarding the express intention of the settlor (*In re Weir's Hospital*, [1910] 2 Ch. 124; cf. *Attorney-General v. Price*, [1912] 1 Ch. 667, where this principle seems to have been overlooked).

When it is determined that there is a general intention of charity the court orders a scheme to be prepared by,

or with the approval of, the Attorney-General for its approval. This is subsequently submitted to the court, and, on approval by it, takes the place of the original purposes designed by the settlor. This may be done even where the charity to be benefited is abroad, if the trustees or any of them are within the jurisdiction, more especially if the trust fund is to stay in England (*In re Tagliano* (1906), 75 L. J. Ch. 119). The Attorney-General and the trustees of the charitable trust are the only persons who are entitled to settle the scheme for the application of the trust fund. Other persons can intervene only when the scheme is submitted for the confirmation of the court (*In re Hyde Park Place Charity*, [1911] 1 Ch. 678).

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#### ART. LXXVIII.—*Application of the Rule against Perpetuities to Charitable Trusts.*

(1) A determining condition which may not be fulfilled within a life or lives in being and twenty-one years—

(i) is not bad as being contrary to the rule against perpetuities when it is attached to a trust for a charitable purpose, if the gift over on fulfilment of the condition is for another charitable purpose;

(ii) is bad when so attached, if the gift over is not for another charitable purpose, or if the trust to which it is attached is not charitable though the gift over is for a charitable purpose ;

(2) Provided that where a charitable trust is of personality, and the gift for the charitable purpose is of the income of the trust property merely, then such a determining condition attached to the trust is good, if on the fulfilment of the condition the trust property

is only to result back to the settlor or to his personal representatives for the benefit of his residuary legatees or next of kin.

(3) When property is directed to be used by trustees for a charitable purpose, the fact that no limit is placed upon the period of time for which it is so to be used will not make the direction bad as contrary to the rule against perpetuities, and, so long as the property has not passed into the hands of purchasers for value without notice, the trust in favour of the charitable purposes can be enforced.

#### PARAGRAPH (1).

Thus, in *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252, a testator bequeathed to the trustees of a charity a sum of money subject to a condition that they kept in repair his family vault in H. cemetery, and on breach of such condition he directed that the legacy should go to another charity. On a summons to ask the court if the condition was good :—*Held*, that it was. But in *Re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491, another testator left money upon trust to establish and maintain for ever schools in certain parishes, subject to the condition that if the Government should establish a general system of education the trust fund was to fall into his residuary estate which he bequeathed to his three sisters. The Government having established a general system of education, the question arose whether the testator's sisters were entitled to the trust fund :—*Held*, that as the gift over was to individuals and not to a charity it was bad as contrary to the rule against perpetuities. Again, in *Re Lord Stratheden and Campbell, Alt v. Lord Stratheden and Campbell*, [1894] 3 Ch. 265, the testator by his will left an annuity out of his residuary estate to be provided for a volunteer corps on the next appointment of a lieutenant-colonel. He made S. his residuary legatee :—*Held*, that the gift was bad, as the interest to which it was attached—the residuary gift to S.—was not charitable and

it was conditional upon an event which might not occur within the period allowed by the rule against perpetuities. (And see *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; *In re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337.)

### PARAGRAPH (2).

Thus, in *Re Randall, Randall v. Dixon* (1888), 38 Ch. D. 213—recently followed in *Re Blunt's Trusts*, [1904] 2 Ch. 767—a testatrix bequeathed funds on trust to pay the income to the incumbent of a certain church for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings were ever demanded she directed the funds to fall into the residue of her estate:—*Held*, that as there was no general intention to devote the funds to charitable purposes, but merely a gift of the income of the fund so long as a certain condition was observed, and as on failure of this condition the fund was to go where the law would vest it in case the testatrix had made no disposition of it whatever, that disposition was good.

This decision is carefully to be distinguished from *Re Bowen (supra)*. In *Re Bowen* the fund itself was given to the charity subject to a gift over on breach of condition. In *Re Randall, supra*, the fund was not given, but merely the income of the fund up to the happening of an uncertain event, and then the fund was to lapse into the residue of the testatrix's estate. I confess I cannot see much force in the distinction, since the doctrine has always been that a gift of the income of property is a gift of the property itself, or, as was said by the same learned judge (NORTH, J.) who decided *Re Randall (supra)*, “The power of appointing the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit” (*Re L'Herminier, Mounsey v. Buston*, [1894] 1 Ch. 675, at p. 676).

### PARAGRAPH (3).

It is to be noted that this has nothing to do with gifts over. What is meant is that once property is impressed

with a charitable trust, such trust remains binding upon it for ever. If A., for example, left property to trustees in trust to pay the income to his son B. for life, then to B.'s eldest son for life, then to such son's children equally, and then to their children's children equally, and so on for ever, this being a private trust, the trusts after that in favour of B.'s eldest son would be void *ab initio*, although there is no gift over (*Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332). But if property be settled in trust, that the income shall "from time to time be given to such of the lineal descendants of R. W. as may severally need," with no gift over, this is a charitable trust and perfectly good (*Gillam v. Taylor* (1873), L. R. 16 Eq. 581); and if there is any default in carrying it out hundreds of years after the settlement the court will enforce it.

A remarkable example of this is the case of *Smith v. Kerr*, [1902] 1 Ch. 774. There, Clifford's Inn was in 1618 assured to trustees for the purpose that it "shall and may hereafter continue to be employed as an Inn of Chancery for the furtherance of the practisers and students of the Common Law of the Realm." For many years Inns of Chancery—which were preparatory schools of law for the Inns of Court—had ceased their educational functions, and the members of the Society of Clifford's Inn had since then treated the Inn as their private property. In 1901, on action brought:—*Held*, that the property was held on a trust for the advancement of legal education, which trust must be carried out.

It is to be remembered that the Charity Commissioners have large powers to alter the objects, especially of ancient charities—that is, charities which have existed over fifty years—by schemes prepared by them. These schemes, like those approved by the court, should be *cy-près* the original objects of the trust. There is an appeal from the schemes of the commissioners to the court, but the court will not interfere unless the commissioners have violated some rule of law, or have been guilty of some gross oversight which calls for the intervention of the court (*Re Campden's Charities* (1881), 18 Ch. D. 310).

ART. LXXIX.—*Assurances of Land on Charitable Trusts.*

Assurances of lands or money to be laid out in the purchase of land, to trustees for charitable purposes, if made by deed are void unless the assurance satisfies the requirements of Part II. or the charitable purpose is within the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888. If made by will they are valid, but the land must, unless with the consent of the court or of the Charity Commissioners to the contrary, be sold within one year of the testator's death, and the money must not be laid out in the purchase of land (Mortmain and Charitable Uses Act, 1891).

The matters dealt with in the above Article concern the law of property rather than the law of trusts. A very short summary, however, of the provisions of the two Mortmain and Charitable Uses Acts may be useful.

The Mortmain Act, 1736, declared gifts by will of land (which included money secured on land), or money to be laid out in the purchase of land, to charities, to be void, and subjected gifts made otherwise to certain conditions. The Mortmain and Charitable Uses Act, 1888, substantially re-enacted the Mortmain Act, 1736.

Part II. of the Act of 1888 enacts that an assurance of land or of personal estate to be laid out in land, in order to be valid, must fulfil the following conditions, which it will be seen rendered gifts by will of land and of personal estate to be laid out in land impossible : assurance (1) must take effect in possession ; (2) must be without power of revocation, reservation, condition or provision in favour of the assuror, save reservation of peppercorn rent, of mines or easements, covenants to repair, right of re-entry for non-payment of rent or

breach of covenant, and reservations of like nature ; (3) must be by deed executed in the presence of two witnesses unless the land is copyhold and the personal estate is stock in the public funds ; (4) must be made at least twelve months before the death of the assuror ; (5) if the personal estate is stock in the public funds, must be made by transfer at least six months before the death of the assuror ; (6) if not of stock in the public funds, must be enrolled in the Central Office of the Supreme Court within six months after execution. Conditions (3), (4), and (5) do not apply where the assurance is made bona fide for valuable consideration.

Part III. exempts altogether from the operation of Part II. assurances for the benefit of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of their colleges, and assurances, save by will, of land to societies for the promotion of religion or learning where the land given does not exceed two acres and is for building purposes. It further exempts gifts by deed or will of land for public parks, museums, and elementary schools, where the land given to the first does not exceed twenty acres, to the second two acres, and to the third one acre.

By the Mortmain and Charitable Uses Act, 1891, "land" is not, either in it or in the Act of 1888, to include money secured on land. This Act further gives a free power to testators to leave land to charities, but such land must be sold within a year, unless the consent of the Charity Commissioners or the court to the contrary is obtained. And money to be laid out in the purchase of land may be freely bequeathed to charities, but the money is to be held for the benefit of the charity as if there had been no such direction.

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ART. LXXX.—*Enforcement and Administration  
of Charitable Trusts.*

(1) Charitable trusts, being trusts not for the benefit of individual cestuis que trust but for

the benefit of the public, cannot (subject to the provisions of the Charitable Trusts Act) be enforced, except by or through the Attorney-General as representing the King.

(2) In the administration of charitable trusts, powers given to the trustees may be exercised by a majority of them contrary to the wishes of the minority.

#### PARAGRAPH (1).

A private person can now under sects. 17 and 19 of the Charitable Trusts Act, 1853, commence proceedings for the enforcement of a charitable trust on obtaining the certificate of the Charity Commissioners (see *Rooke v. Dawson*, [1895] 1 Ch. 480).

#### PARAGRAPH (2).

When the trustees of a private trust have a power to do or not to do a certain thing such power cannot be exercised except all the trustees agree to its exercise (*supra*, p. 109). This is not so when the trust is charitable. There such powers may be exercised by a majority of the trustees without the consent or contrary to the wishes of the minority (*In re Whiteley, Bishop of London v. Whiteley*, [1910] 1 Ch. 600).

## SECTION II.—PRESUMED TRUSTS.

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### ART. LXXXI.—*Failure of Express Trust.*

Where a settlor transfers property to a trustee and there is, owing to any cause, a total or partial failure to vest the equitable estate in such property in a cestui que trust, or the trusts declared do not exhaust the whole equitable estate, then there is a presumption that in so far as there is such failure or the equitable estate is not exhausted, the settlor intended the property to be held in trust for himself. To such trusts as these the provision of the Statute of Frauds that trusts of land must be evidenced in writing has no application.

It is a rule of the common law that in so far as a grantor does not effectively convey his estate to the grantee or grantees it remains in him. The above Article is a mere application of this rule to assurances in equity: in so far as a settlor does not effectively assure his equitable estate to the cestui que trust or cestuis que trust it remains in him. Thus if A. conveys a freehold to B. for life and on B.'s death to B.'s eldest son in fee simple and B. dies without ever having had a son, the fee simple is still in A. If A. instead had conveyed the freehold to trustees to pay the net rents to B. for life, and on B.'s death to convey it to B.'s eldest son in fee simple, and B. died without ever having had a son, the equitable fee simple would remain in A. But instead of saying this the chancery lawyers say the equitable estate results to A. As a matter of fact it

never was out of him, for there never was anybody to take it.

This being so, the trusts arising under the rule are rather constructive than presumptive trusts, since they are based less on any presumed intention than on a rule of law. At the same time it is usual to place them among presumed or implied trusts, and, after all, it is no very violent presumption to assume that so far as the settlor had any intention in the matter, he intended, if the persons he wished to benefit did not take the property, it was to remain his.

It was inattention to the above considerations which led to much litigation in the case of *Smith v. Cooke*, [1891] A. C. 297. In ordinary trusts for the payment of the settlor's creditors, on the payment of the creditors in full, there is a resulting trust of any surplus there may be for the settlor (*Johns v. James* (1878), 8 Ch. D. 744; Stra. L. C., p. 87). This is because the trusts declared do not exhaust the equitable estate, and the balance of it therefore remains in the settlor. In *Smith v. Cooke* (*supra*), however, the settlor assigned his estate to trustees to sell and divide the proceeds among his creditors in rateable proportions according to the amount of their respective debts. Here the trusts declared did exhaust the equitable estate. There being, however, a large surplus after payment of his debts in full, the settlor, blind to this distinction, claimed it on the general principle applicable when the trust is for payment of the settlor's debts. The House of Lords decided that he was not entitled to it.

It is also to be remembered that it is only on the failure of absolute trusts that there is a resulting trust for the settlor. It is, for instance, a common practice among testators (but the same rule applies to trusts *inter viros*: *Doyle v. Crean*, [1905] 1 I. R. 252) to leave funds on trust for an unmarried woman with a direction that should she marry they are to be settled on herself and her children. Here the trust for the children is only contingent and on its failure the trust for the woman becomes absolute. The principle is called the rule in *Lassence v. Tierney* (1847), 1 Mac. & G. 552. (And see Under. and Stra. Inter. of Wills, pp. 293—296.)

So many cases of resulting trusts arising through failure of trust have already been referred to (see *ex gr.* Art. XXIII.), that it is not necessary to give more examples. It should, however, be borne in mind in this connection that by the law of evidence, parol (or oral) evidence is not admissible to vary a written instrument, and accordingly, if on the face of the trust instrument the trustee is described as a trustee, he cannot give evidence to show the intention was that any of the equitable estate not disposed of under the trust was to belong to him.

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ART. LXXXII.—*Purchases through and Transfers to other Persons.*

(1) Where the person purchasing and paying the purchase-money for property, real or personal, has it assured to another, or others, or to himself jointly with another or others, there is a presumption that he intends such other or others to hold it in trust for himself. To such trust the provision of the Statute of Frauds that trusts of land must be evidenced in writing does not apply.

(2) Where a person assures pure personality to another, or others, or to himself jointly with another or others who give no consideration for the assurance, there is a presumption that he intends such other or others to hold it in trust for himself.

(3) The presumption in either case can be rebutted or supported :

(a) By evidence of surrounding circumstances.

The most important evidence of surrounding circumstances consists of evidence showing

that the relationship subsisting between the parties at the date of the transaction was such as to impose a legal or quasi-legal obligation on the purchaser or transferor to provide for the other person.

(b) By evidence of statements made by the parties.

To prove that a gift was intended, evidence of statements made by the purchaser or transferor before, at, or after the purchase or transfer, but only of statements made by the other or others before or at the purchase or transfer, is admissible.

To prove that a trust was intended, evidence of statements made by the other or others before, at, or after the purchase or transfer, but only of statements made by the purchaser or transferor before or at the purchase or transfer, is admissible.

#### PARAGRAPHS (1) AND (2).

In the leading case of *Dyer v. Dyer* (1788), 2 Cox, 92, at p. 93, EYRE, C.B., in giving judgment, says : "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold ; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser ; whether in one name or several ; whether jointly or *successiire*, results to the man who advanced the purchase-money." The rule applies equally to pure personality.

The most recent case of the application of this rule is *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282. A. took out a policy of assurance on his own life "for behoof of" B., who was A.'s

deceased wife's sister. Afterwards A. went through the ceremony of marriage with B. A. retained the policy in his possession during his life and paid the premiums. On his death the question arose whether the policy money belonged to B.'s executors, B. having predeceased A., or to A.'s executors :—*Held*, that as B. was not the legal wife of A. but in law a stranger, and as there was no parol evidence to show that A. intended it as a gift to B., it must be presumed that A. intended it for his own benefit, and that B.'s personal representatives were trustees of the money for A.'s executors. (And see, as to purchases made by a husband in his own name with his wife's money, *Mercier v. Mercier*, [1903] 2 Ch. 98.)

The rule applies equally to transfers of pure personality to other persons who give no consideration for them (*Standing v. Bowring* (1885), 31 Ch. D. 282), but not to conveyances of land (*Fowkes v. Pascoe* (1875), L. R. 10 Ch. 343; *Stra. L. C.* 187). The ground for this distinction given by Lord HARDWICKE in *Young v. Peachy* (1741), 2 Atk. 254, is that there is no presumption that in fact the grantor intended the land to be held for him on a voluntary conveyance. Why the presumption of fact should be different in the case of land from what it is in the case of goods it is hard to discover. No such distinction was taken before the Statute of Frauds, 1677. But owing to the decision that trusts of land do not arise by operation of law on the transfer of the land to a person who gives no value, if such a trust is intended it must be evidenced by writing.

Probably this doctrine of a presumed resulting use arose out of two now obsolete practices which made it at one time reasonable at least as far as land was concerned. The first was the practice of making feoffments of land to the use of the feoffor's—*i.e.*, the grantor's—will, which was a very common practice before the Statute of Wills, 1540, made freehold land devisable at law. Often the uses upon which the feoffee was to hold the land were declared orally, and therefore to prevent fraud it was reasonable enough to assume that when a feoffee took land without giving value he held it in trust for the feoffor till the contrary was shown. The other practice was that of taking conveyances of freeholds in the names of other persons than the purchaser in order to bar dower. This

practice prevailed down to the passing of the Dower Act, 1833 (see *supra*, Art. XII.). Perhaps the fact that the one practice was obsolete, and the other was in operation at the date of *Young v. Peachy* (*supra*), accounts for Lord HARDWICKE's decision.

### PARAGRAPH (3).

(a) The relationships which impose this obligation are those of father to son (*Crabb v. Crabb* (1834), 1 My. & K. 511) or daughter (*Clark v. Danvers* (1678), 1 Ch. Cas. 310), husband to wife (*Re Eykyn's Trusts* (1877), 6 Ch. D. 115), grandfather to grandchild, the father being dead (*Ebrand v. Dancer* (1680), 2 Ch. Cas. 26), and a person *in loco parentis* to adopted child (*Currant v. Jago* (1844), 1 Coll. 261). As to what constitutes the latter relation, see *infra*, Art. XCIX. In all these cases the relationship is sufficient *prima facie* to rebut the presumption. It is doubtful whether the relationship of mother to child, where the father is still living, is sufficient (*Bennett v. Bennett* (1879), 10 Ch. D. 474; but cf. *Batstone v. Salter* (1875), L. R. 10 Ch. 431; and *In re Ashton*, [1897] 2 Ch. 574), though now probably, since the Married Women's Property Act, 1882, sect. 21, imposes a legal obligation on married women to support their children under certain circumstances, it is. And a rebuttal of the presumption may arise through other circumstances than these, such, for instance, as where the persons into whose names stock is transferred are the trustees of a settlement by which the transferor had previously settled money (*Re Curteis* (1872), L. R. 14 Eq. 217).

Though these relationships are in themselves sufficient to rebut the presumption, yet the counter-presumption arising from them may itself be rebutted either by sure evidence of other surrounding circumstances or by direct evidence of intention. Thus the fact that a father who had bought property in an adult son's name himself continued to manage it (*Stock v. McAvoy* (1872), L. R. 15 Eq. 55), or the fact that the son was his father's man of business (*Garrett v. Wilkinson* (1848), 2 De G. & Sm. 244), is a sufficient circumstance to rebut the rebuttal arising from the blood relationship. In the words of JESSEL, M.R., in *Marshall v. Crutwell* (1875), L. R. 20 Eq. 328, at p. 329:

“Although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So, in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust.” (And see *Pole v. Pole* (1747), 1 Ves. sen. 76.)

In *Ex parte Cooper*, W. N. (1882), p. 96. LINDLEY, L.J., is reported to have said that “when the parties to such a transaction are alive to give evidence, there is no occasion to resort to any presumption : the question is one of fact.” The question is always one of fact, and it is submitted that, when the parties are alive the presumption applies as much as when they are dead, since it decides upon whom lies the burden of proving that a trust was or was not intended.

(b) This rule depends on the rule of evidence that the declarations of a person in his own interest cannot be admitted to support his claim, but evidence of declarations against his own interest are admissible to rebut it (*Stock v. MeAvoy* (1872), L. R. 15 Eq. 55).

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#### ART. LXXXIII.—*Principles Applicable to Presumptive Trusts.*

There being no trust instrument to impose or confer special duties or powers on the owners of the legal estate, presumed trusts must always be simple trusts.

The principles applicable to declared simple trusts apply equally to presumed trusts.

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### SECTION III.—CONSTRUCTIVE TRUSTS.

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#### **ART. LXXXIV.—*When a Stranger to a Declared Trust is a Constructive Trustee of the Trust Property.***

Where a stranger to a trust assumes to act as trustee, and in that capacity receives trust property, or where a stranger receives trust property knowing that it is being transferred to him in breach of trust, he is a constructive trustee of such property for the cestui que trust.

A stranger to a trust who, though receiving no part of the trust property, knowingly aids a trustee to commit a fraudulent breach of trust, is chargeable as a constructive trustee of the trust property.

It has already been pointed out that a stranger to the trust who takes trust property without giving value for it gets no better title to it than the trustee had (*supra*, pp. 155 *et seq.*). In this note the liability of other persons having dealings with the trust property or the trustees will be considered.

“Strangers” here includes agents employed by the trustees in connection with the trust estate, such as solicitors, brokers, bankers, etc.

A stranger who assumes to act as a trustee is called a trustee *de son tort*. In order to constitute a person a trustee *de son tort* he must actually receive the trust money or put himself in such a position that he could, if he chose, appropriate it to his own use. For example, in *Re Barney, Barney v. Barney*, [1892] 2 Ch. 265, a deceased miller's widow was sole trustee of his estate under a trust to convert and invest the proceeds in trust securities, and hold the same in trust for herself for life and then for the deceased's children. The widow, who had assisted the deceased in carrying on his business, finding that to wind it up would greatly decrease the income from his estate, determined to continue it. Two friends agreed to assist her in so doing, and a banking account consisting of trust money was opened, upon which the widow was alone entitled to draw, but the bank was not to honour her cheques unless they were initialled by the two friends. The friends were aware that the carrying on of the business by the widow was a breach of trust. The friends received no remuneration, and there was no suggestion of fraud made against them. They paid many bills with cheques drawn by the widow and initialled by them. Ultimately the business proved a failure, the widow executed an assignment in favour of creditors, and the estate was distributed in payment of the trade debts. The children thereupon brought an action against the two friends, claiming a declaration that they were liable to repay all the money paid to or through them otherwise than for the purposes directed by the testator's will, and that each of them was liable for all the estate of the testator employed in carrying on the business, with profits or interest at 5 per cent. :—*Held*, that the two friends were not liable, as none of the trust property had ever been in their possession or under their control.

Even where a stranger in the ordinary way of business knowingly receives trust money he is not liable to account unless at the time he received it he not merely knew that it was trust money but had reason to believe that it was being transferred to him in breach of trust.

Thus, in *Thomson v. Clydesdale Bank, Limited*, [1893] A. C. 282, A., a trustee, sent certain trust shares to B., a stockbroker, to be sold. B. sold the stock and paid the

proceeds into his bank. At the time he paid in the proceeds his account was largely overdrawn. The bankers knew that he was a stockbroker, and that this money, being the proceeds of the sale of shares, was probably money belonging to his clients. They nevertheless appropriated it to the liquidation of his overdraft. Subsequently B. became bankrupt. A. claimed that the bank was a constructive trustee of the proceeds of the sale of the shares:—*Held*, that it was not. Though it had reason to believe that the money paid in was clients' money, it had no reason to believe that B. was not entitled to deal with it as he had done.

The same rule applies to the payment of a solicitor's costs out of trust funds (*Re Blundell*, *Blundell v. Blundell* (1889), 40 Ch. D. 370), and to auctioneers, stockbrokers, and all others having dealings with trustees (*ibid.*).

Once a stranger to the trust receives trust property with notice of the trust, he is liable for it even when through misinterpretation of the terms of the trust he was unaware in fact that the property was trust property. Thus, in *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, a testator left a cottage and the land occupied with it in trust for A., his wife, for life, and then to his children equally. After execution of his will he bought two other fields and occupied these with the cottage. On his death A. and B., the testator's heir-at-law, approached C., a solicitor, as to a mortgage upon the two fields. C. was advised by counsel that these two fields were not comprised in the trust devise, and that they belonged to the testator's heir-at-law, B., subject to A.'s dower. C. advanced money on mortgage of the fields. Subsequently he sold them as mortgagee. The children of the testator then claimed the purchase-money:—*Held*, that on a true construction of the will the two fields did pass under the trust devise, and that C. was a constructive trustee of the purchase-money for the cestuis que trust under the will (cf. *Jared v. Clements*, [1903] 1 Ch. 428, cited *supra*, p. 28; and see *Soar v. Ashwell*, [1893] 2 Q. B. 390).

Where the stranger receives the trust money with notice of the trust, but in his dealings with it acts merely as the agent and on the instructions of the trustee, it seems that

he is liable only where he deals with it on such instructions as on the face of them must be a breach of trust (see *Mara v. Browne*, [1896] 1 Ch. 199).

Where, however, the stranger does not receive the trust property, whether he acts as agent or not, he is not liable for breach of trust, even when he advised the breach, unless the breach was fraudulent. Thus, in *Stokes v. Prance*, [1898] 1 Ch. 212, a solicitor advised trustees to invest trust money on a contributory mortgage—*i.e.*, a mortgage in which different persons contribute shares of the mortgage money—which was plainly a breach of trust:—*Held*, that though this might render him liable for negligence, it did not make him a constructive trustee.

The whole effect of these cases may be summed up in one sentence of the judgment of Lord SELBORNE, C., in *Barnes v. Addy* (1874), L. R. 9 Ch. 244; Stra. L. C., p. 194: “Strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

In the same way a retired trustee is not liable for a breach of trust committed by the remaining or new trustees unless he retired with the intention of enabling them to commit it (*Head v. Gould*, [1898] 2 Ch. 250).

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**ART. LXXXV.—A Trustee or Agent is a Constructive Trustee of Improper Profits.**

Where a trustee or any agent makes a personal benefit or profit in connection with his management of the trust property or the pecuniary affairs of his principal in a way that tends to put his interests in conflict with his duties

as trustee or agent, he is a constructive trustee of such profit for his cestui que trust or principal, even though he can show that the interests of his cestui que trust or principal did not in fact suffer through the transaction.

The leading case on this subject, as far as declared trusts are concerned, is *Keech v. Sandford* (1726), Sel. Ca. Ch. 61. There A. was trustee of a certain leasehold for an infant cestui que trust. Towards the expiration of the lease the trustee applied for a renewal on behalf of the infant, which the freeholder refused on the ground that the infant could not enter into the usual covenants. The trustee then applied for and was granted a renewal on his own account :—*Held*, that he was a constructive trustee for the infant.

Formerly it was thought that this principle extended not merely to trustees but to every one taking an interest in the settled property, such as the tenant for life (*James v. Dean* (1808), 15 Ves. 236). But the law has now been reconsidered in *In re Biss, Biss v. Biss*, [1903] 2 Ch. 40. There A., having a shop held from year to year, died intestate. B., his widow, took out administration. There were three children, one being an infant, and C., an adult child, continued with B. to carry on the business. B. applied to the landlord for a new lease on behalf of A.'s estate. The landlord refused. C. then applied on his own behalf, and the landlord granted the lease. B. then claimed that C. should be declared a trustee of the new lease for her as administratrix of A.'s estate. The court rejected the claim. There is a constructive trust of the new lease only where the person obtaining the renewal occupied a fiduciary position, such as declared or presumptive trustee, executor, administrator, or partner, or mortgagor or mortgagee of the old lease. Where he occupied no such position but had merely a partial interest in the old lease, if he obtains a renewal he holds it for his own benefit, unless (a) the lease was renewable by custom or covenant ; or (b) he surrendered a remainder of the old lease when he obtained the new one ; or (c) he used some fraud or concealment in obtaining the new lease (*per ROMER, L.J., ibid.* ; and see *Hunter v. Allen*, [1907]

1 I. R. 212, and *cf. In re Turpin and Akern*, [1905] 1 Ch. 85).

Trustees themselves are not prohibited from purchasing the freehold reversion on a lease held by them on trust unless the lease is renewable by custom, covenant, or practice (*Bevan v. Webb*, [1905] 1 Ch. 620).

As to a trustee making personal profit out of his trust, we have already seen that this is contrary to his duty as trustee (*supra*, Art. XLVII. ; and *Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360).

As regards profits made by agents who are not trustees in the ordinary sense, such as persons buying or selling for their principal, the most common of these are what are called secret commissions or bribes. Of these the agent is constructive trustee to this extent, that the principal is entitled to recover them from the agent (*Lister and Company v. Stubbs* (1890), 45 Ch. D. 1). But where the agent's acts are severable and he has made legitimate profits on some and illegitimate profits on others, the principal can treat as profits to which he is entitled only the profits made improperly (*Nitedals Taendstikfabrick v. Brustu*, [1906] 2 Ch. 671).

#### ART. LXXXVI. — *Principles Applicable to Constructive Trusts.*

The principles applicable to declared simple trusts apply equally to constructive trusts arising under the two preceding Articles, subject to this limitation : When a profit received by a trustee or agent comes not directly out of or through the use of the trust property itself, but from a source outside the trust property, though he receives it in his capacity as trustee or agent, such profit is only an equitable debt due by him to the cestui que trust.

As has already been pointed out (see *supra*, Art. LXXI. and note), until the Trustee Act, 1888, the Statutes of

Limitation did not run as to express trusts, but they did run as to "constructive" trusts. In the above Article I have attempted to distinguish where the express trust in this sense ends and the constructive trust in this sense begins.

When by trading with or otherwise dealing with the trust property a trustee makes a personal profit out of it, this profit is part of the trust estate. It can be followed like other trust money as long as it can be distinguished. But when a profit is made which does not come out of the trust estate, either directly or by the use of the latter, then such profit is no part of the trust estate. Thus, if A., the director of a company, receives a bribe from a debtor of the company in order to induce him to use his influence to secure the debtor favourable terms of settlement, the bribe is not the property of the company until at any rate the court declares that it is (*Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319). It is merely an equitable debt due from him to the company, and the Statutes of Limitation commence to run in respect of it from the time the company has notice that he received the bribe (*ibid.*). Again, if an agent receives secret commission on the purchases he makes on behalf of his principal and invests it in securities which can easily be distinguished from his other property, the principal is not entitled to follow the secret commission into such securities (*Lister and Company v. Stubbs* (1890), 45 Ch. D. 1). All that he has a right to do is to sue the agent for the value of such commissions. The relation is really that of equitable debtor and creditor, not that of trustee and cestui que trust.

Where an agent makes profit out of his dealings with his principal's property, it is submitted that such profit is *ab initio* the property of the principal, and, just like other trust property, can be followed into investments (see *Re Hallett's Estate* (1879), 13 Ch. D. 696; Stra. L. C 149).

Where the relations between the principal and agent are purely contractual, as where an agent is retained to sell the principal's goods, receiving the purchase money and from time to time settling accounts with the principal,

then the moneys he receives are his own, and he is simply the debtor of the principal for their amount.

It has already been pointed out that a stranger who innocently obtains the trust funds is only an equitable debtor to the extent of their value, at any rate when they are no longer capable of being traced.

## SECOND DIVISION OF EQUITABLE RIGHTS.

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### EQUITIES TO PROMOTE FAIR DEALING.

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### *ART. LXXXVII.—Principles governing the Subject-matter of the Division.*

Of the subjects dealt with in this division of equitable rights, those discussed in the first four sections were within the exclusive jurisdiction of equity, and therefore are subject to equitable principles only, but those discussed in the last two sections were within the concurrent jurisdiction, and therefore, generally speaking, are subject to legal principles.

The principles on which are based the doctrines of conversion, election, performance, satisfaction, ademption, and part performance are purely equitable, but those regulating the other matters here dealt with are generally purely legal. The Court of Chancery intervened in them only because it could give a more efficient remedy. At the same time equity always tended to alter the legal principles, more especially by deciding questions of fact,

not on the evidence in the case before the court, but on general principles. This tendency has now been very effectually checked by the recent decisions of the House of Lords in *Derry v. Peek* (1889), 14 App. Cas. 337 ; and *Colls v. Home and Colonial Stores, Limited*, [1904] A. C. 179 ; but its effects are still to be seen in such doctrines as those relating to equitable or presumed fraud (see Art. CXIV.) and undue influence (see *infra*, Art. CXV.).

## SECTION I.—CONVERSION.

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### ART. LXXXVIII.—*Modes in which Conversion arises.*

Legal realty may in equity become personality or legal personality may in equity become realty :

- (i) Where a trust instrument imperatively directs trust realty to be sold or trust personality to be invested in the purchase of land ;
- (ii) Where a binding contract is made for the sale of land ;
- (iii) Where an order of the court is rightfully made for the sale of land ; or
- (iv) Where land is made subject to a partnership agreement.

Where though conversion has taken place in equity, land has not been in fact changed into money, or money has not been in fact changed into land, the conversion will henceforth be called *equitable* ; where land has been in fact changed into money, or money has been in fact

changed into land, the conversion will henceforth be called *actual* conversion.

The doctrine of conversion has already been stated, and examples of its operation given (see Art. XI.).

It should be noted that equitable conversion extends to more than the notional changing of realty into personality or of personality into realty. Thus in the case of wasting and reversionary securities, one kind of personality—leaseholds or future interests in personality—is notionally changed into another kind of personality, *viz.*, trust securities. That conversion is important, since it affects the amount of income which the persons entitled to the property are respectively to receive. But most other conversions which have not the effect of changing realty into personality or personality into realty are of little importance, since they do not affect the general characteristics of the property, and especially that very important characteristic, its mode of devolution on the death of the person entitled to it. It is convenient, then, to confine the doctrine of conversion to notional changes of “land into money or money into land,” as the doctrine is briefly and popularly stated (see *per* BOWEN, L.J., in *Attorney-General v. Hubcock* (1884), 13 Q. B. D. 275, at p. 289).

The examples given in the note to Article XI. are examples of conversions arising through express directions in trust instruments and through contracts for the sale of freeholds. Nothing but an imperative direction in a trust instrument to convert will suffice to attach the attributes of realty to personality or vice versa (*In re Walker*, [1908] 2 Ch. 705). The doctrine depends on the maxim that “equity regards that as done which ought to have been done”; and so there is no conversion unless there is a duty to convert. But such an imperative direction may be sometimes implied at any rate in executory trusts. Thus, if in an executory trust the trustees were directed to have personality settled on the settlor’s eldest son for life and then on his first and younger sons in tail, with a gift over in fee simple in default of sons, it might fairly be assumed that this implied that the settlor intended the trust funds to be invested in land (see *Earldom v. Saunders* (1754), 1 Amb. 240; and cf. *Atwell v. Atwell* (1871), L. R. 13 Eq. 23).

The reason why partnership agreements convert realty is this, that, where there is no provision to the contrary in the partnership instrument, a partner is not entitled on dissolution of the partnership to any specific part of the partnership property, but merely to have the partnership property sold and to receive his share of the proceeds. The consequence is that equity regards partnership realty as in effect held by the partners on an implied or constructive trust for sale (*Waterer v. Waterer* (1873), L. R. 15 Eq. 402).

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#### ART. LXXXIX.—*Times at which Conversion arises.*

Equitable conversions arising under trust instruments take place from the time the trust instrument came into operation; those arising under contracts for the sale of land, from the date when the contract became effective in equity; those arising under an order of sale made by the court, from the time the order was made; and those arising under partnership agreements, from the time the land became substantially involved in the partnership business.

As regards trusts for conversion, whether these will cause a conversion in equity will depend upon the state of affairs when the time for the trust coming into operation arrives. If the state of affairs then causes a conversion the conversion will relate back to the time when the trust instrument came into operation. Now it is to be remembered that deeds operate from delivery, while wills operate from the death of the testator. Accordingly, where the trust is declared by deed, then, on failure of the purposes of the trust, the trust property results to the settlor. If he is dead his heir, next of kin, or residuary devisee or legatee who claims to be entitled to it must claim through him. On the other hand, where the trust is declared by will, then,

on failure of the purposes of the trust, the trust property results, not to the settlor, but directly to the settlor's heir, next of kin, or residuary devisee or legatee, as the case may be. The importance of this distinction will appear when we come to consider the devolution of the resulting interests (see next Article).

As regards conversions arising out of contracts for the sale of land, most of the cases turn on contracts by which options are given to purchase which are not exercised until after the death of the vendor. The effect of the decisions is this: the general rule is, that as between the heir and the personal representative of the deceased vendor, whether the vendor died testate or intestate (*In re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506), the conversion takes place from the time a binding contract was made by him to sell the estate. Where the contract only creates an option to purchase, then no conversion takes place until the option is exercised. Once, however, that option is exercised it takes effect by virtue of the contract which created it, and the contract becomes a binding contract for the sale of the land, and consequently operates to convert it into personality from the date of such contract. This rule, which is usually called the rule in *Lawes v. Bennett* (1785), 1 Cox, 167, has long been held to apply as between devisees and legatees of the vendor, except perhaps when the devise of the property over which the option is given was specific and the will was made *after* the option was given (*In re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724; *Sm. 722*). Recently it has been held that it applies also as between the deceased vendor's heir and administrator.

In *In re Isaacs, Isaacs v. Reginall* (*supra*), A. being owner in fee simple of a house, leased it in 1880 to B. for A.'s life. The lease contained a provision that for six months after A.'s death B. should have the option of purchasing the house at the price of £750. A. died intestate on January 9th, 1894, and on April 25th, 1894, B. exercised his option to purchase. The question in the action was whether the £750 paid by B. belonged to the plaintiff, who was A.'s heir, or to the defendant, who was his administrator:—*Held*, that it belonged to the latter, as the equitable conversion of the freehold house into money must on the exercise of B.'s option be considered

to have taken place, not on April 25th, 1894, but in 1880, when the contract was made which created the option.

These decisions were before *Woodfall v. Clifton*, [1905] 2 Ch. 257. In that and in the subsequent decision of *Worthing Corporation v. Heather*, [1906] 2 Ch. 532, it was held (i) that options to purchase given for consideration, do not run with the land ; (ii) that where they are not limited to a period within a life or lives in being and twenty-one years they are void for remoteness ; but (iii) that they constitute even when void for remoteness a good personal contract at common law between the parties. How this will affect the doctrine of conversion by contract as above stated is not yet settled by authority. It is submitted that an option, void as creating a perpetuity, will not operate to convert, since, though good as a personal contract, it is not binding upon the land either at law or in equity.

The whole of these decisions as to conversion by option are contrary to principle. A power to sell converts only from the time it is exercised, not from the time the trust creating it arose (*In re Dyson*, [1910] 1 Ch. 750). Why then an option to purchase should have a different effect is hard to say.

An order of sale rightfully made by the court causes an equitable conversion from the date of the order (*In re Dodson*, [1908] 2 Ch. 638).

As regards conversions of land into personality arising out of partnership agreements, the law as to when property becomes partnership property is now stated in sect. 20 (1) of the Partnership Act, 1890 : "All property, and rights and interests in property, originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement." Where the partnership agreement defines what the partnership property is no difficulty arises. But where the agreement does not so define the partnership

property, questions of much difficulty arise as to whether land has been so used or acquired for partnership purposes as to make it partnership property, and therefore as between the partners themselves and as between the real and personal representatives of a deceased partner, personal property (sect. 22, Partnership Act, 1890).

The phrase "substantially involved in the partnership" is one of Lord ELDON's which was adopted by JAMES, L.J., in the leading case of *Waterer v. Waterer* (1873), L. R. 15 Eq. 402. Its application is the difficulty. The effect of the cases is thus summed up by Mr. Underhill (Law of Partnership, p. 90): "Speaking broadly, when we find property bought with partnership money (sect. 21, Partnership Act, 1890) or brought into the common stock, and credited in the books as part of the capital of one of the partners (*Robinson v. Ashton* (1875), L. R. 20 Eq. 25), or otherwise treated by the partners as part or parcel of the partnership property (*Waterer v. Waterer, supra*), the inference is that it is part of the partnership property, and none the less so because the property happens to have been conveyed to or taken in the name of one only of the partners (*Smith v. Smith* (1800), 5 Ves. 188), or that it was originally devised to the partners as co-owners" (*cf. per* NORTH, J., *Re Wilson, Wilson v. Holloway*, [1893] 2 Ch. 340, at p. 343).

When freehold land becomes partnership property, then on the death of one of the partners the legal estate will "devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section" (sect. 20 (2), Partnership Act, 1890).

Thus, if A., B., and C. are partners, and Blackacre, which is a fee simple and partnership property, is vested in them jointly, on the death of A., leaving B. and C. surviving, the whole legal estate will survive to B. and C. But B. and C. will be trustees of Blackaere as regards A.'s personal representatives to the extent of A.'s share in the partnership assets.

**ART. XC.—*Devolution on Failure of Purposes of Conversion.***

(1) Where the equitable conversion arises under a trust instrument, if the purposes for which the actual conversion was directed wholly or partially fail, the property directed to be converted, whether actually converted or not, results wholly or so far as the purposes have failed, to the persons who would have taken it on failure of such purposes if no conversion had been directed.

(2) If such persons are dead when such failure takes place, then whether the property has been actually converted or not, as between the real and personal representatives of such deceased persons the property will result as follows: If the failure of the purposes is total, it will result to those who would have taken if there had been no direction to convert in the trust instrument; if the failure is partial, it will result to those who would have taken if the trust property had always in fact been of the nature into which it was directed to be converted by the trust instrument.

**PARAGRAPH (1).**

As pointed out already, when the trust instrument is a deed (which operates from its execution), so far as the purposes fail, the trust property results to, or rather remains in, the settlor. If he is living, no question arises. If he is dead, his representatives come within paragraph (2).

When the trust instrument, however, is a will (which operates from the death of the testator), there is no resulting trust to the testator since he is dead; the resulting trust is to his representatives themselves. The question then arises, when conversion of realty into personality or of personality into realty is directed by the

will : Who, on failure of the purposes for which the conversion is directed, takes the property to be converted ? The answer is just the same : the persons who would be entitled to it if no conversion had been directed. In other words, in so far as the trust property consists of realty it goes to the heir, and in so far as it consists of personalty it goes to the next of kin. When the will contains a residuary clause difficulties often arise as to whether a conversion is directed for a special object only or for all the purposes of the will. If the court holds that the conversion is for all the purposes of the will, of course a failure of any special purpose will not prevent complete conversion ; and so land directed to be sold will go on failure of the special object to the residuary legatee and vice versa.

This principle was finally decided in the leading case of *Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503. There a testator gave legacies to A., B., C., and D., and then directed his real and personal property to be sold, and his debts and other legacies to be paid out of the proceeds. The residue of the proceeds he directed to be divided between A., B., C., and D. in the proportion of their legacies. A. and B. predeceased the testator, and their shares and legacies lapsed. The next of kin of the testator thereupon claimed these as personal estate :—*Held*, that so far as the residue undisposed of by the will was constituted of the produce of realty, it belonged to the testator's heir-at-law. The conversion of it into personalty was only for the purposes of the will, and in so far as the purposes of the will failed the heir's right to the realty was not displaced. The only mode in which that right could be displaced was by disposing effectually of the whole realty.

#### PARAGRAPH (2).

Now, just as what a settlor by deed does not effectually dispose of by the deed remains in him, so what a testator does not effectually dispose of by his will vests at once in his heir or next of kin, and does not wait to vest until events show that he has not effectually disposed of it. Thus, for example, if a testator leaves Blackacre to A. for life (A. being a bachelor), and on A.'s death to A.'s eldest son in fee simple, in case A. never has an eldest son, then

the testator's heir at law was entitled in right to the fee simple in remainder, not from A.'s death, but from the testator's death. Accordingly, if the testator's heir dies before A., the person who becomes on A.'s death entitled to Blackacre must claim it as the representative of the heir of the testator and not of his own right. The same rule applies to the rights of the next of kin, and of the residuary devisee and legatee (see *Curteis v. Wormald*, cited below).

This being so, when the failure of the purposes for which the conversion has been directed takes place after the death of the settlor, in case the trust is created by deed, or after the death of the heir, next of kin, or residuary devisee or legatee, as the case may be, in case the trust is created by will, any claim made for the trust funds not needed for these purposes must always be made by the legal representative of one of these persons. This then raises the further question, Which of these persons' representatives—the real or the personal representative—is entitled? It is settled law that where the purposes of the conversion have totally failed, then, as no actual conversion can be necessary to carry out such purposes, the direction is a nullity; and accordingly whether actual conversion has taken place or not, there is no conversion in equity, and the representatives entitled to take are those who would have taken had there never been any direction to convert (*Smith v. Claxton* (1819), 4 Madd. 492). This is commonly put that, when the purposes wholly fail, land directed to be sold results back as land; and money directed to be invested in land results back as money; no matter what its actual condition may be at the time it results back. On the other hand, if the purposes have only partially failed, then an actual conversion is necessary to carry out such purposes as have not failed, and accordingly whether actual conversion has taken place or not, there is a conversion in equity, and the representatives entitled to take are those who would have taken had the property been, from the date of the direction to convert, of the nature into which it was directed to be converted (*Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379). This is commonly put that, when the purposes only partially fail, land directed to be sold results back as money; and money directed to be invested in land results back as land; no matter what its actual condition may be at the time it results back.

Thus, in *Curteis v. Wormald* (1878), 10 Ch. D. 172, a testator by his will gave life estates to A., B., and C. in his freehold, with remainders to their sons in fee tail with a remainder in fee simple to D. He then directed his personal estate to be invested in the purchase of freehold lands, and these to be settled to the same uses as he had declared of his own freeholds. In pursuance of this direction the testator's trustees had invested his residuary personalty in land. D. predeceased the testator. A., B., and C. survived him, but all died without issue. At the testator's death X. and Y. were his next of kin. Both X. and Y. had died during the lives of A., B., and C., and F. and G. were now their real representatives, and R. and S. their personal representatives. The question arose whether F. and G. or R. and S. were entitled to the land which now represented the testator's personal estate :—*Held*, that the testator's residuary personal estate had vested in X. and Y. as the testator's next of kin at his death, but that it had vested in them as real estate, and had devolved on F. and G. as their real representatives.

The case of *Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379, is an exact counterpart of *Curteis v. Wormald, supra*. Land there was directed to be sold, and on partial failure of the purposes for which conversion was directed, it was held that the land unsold had vested in the settlor's heir, not as land, but as money.

Total failure of the trusts for which conversion is directed arises most frequently under wills, where it is not unusual for all the beneficiaries under the trusts to predecease the testator. It seldom occurs in the case of deeds ; and this and the fact that, when it does occur in the case of deeds, the trust property results to the settlor, has led many writers to say that a deed creating trusts for conversion converts from its execution whether the purposes of the trusts fail or not. But that is not so. Thus in *In re Grimthorpe*, [1908] 2 Ch. 675, where a settlor by deed settled land upon trust after the death of himself and his wife to sell and divide the proceeds among their children. There were no children :—*Held*, that the trust for conversion having totally failed there was no conversion, and the land resulted back to the settlor as land, and consequently passed under a general devise of his lands.

ART. XCI.—*Devolution on Actual Conversion, proper and improper.*

(1) Where trust property is actually converted properly, then whether the owner is under disability or not, on his death it will devolve according to its nature at that time.

(2) Where it has been actually converted improperly, it will devolve as it would have done had there been no actual conversion.

PARAGRAPH (1).

The leading case is *Steed v. Preece* (1878), 18 Eq. 192. There freeholds were conveyed to trustees to hold in trust for A. and B. as tenants in common in tail with cross remainders. In a suit for the administration of the trust the court ordered a sale and the payment into court of the purchase money. Half of this was paid to A., who was of full age, and the other half was carried to a separate account of B., who was still an infant. B. died unmarried before attaining twenty-one. A. thereupon executed a disentailing deed and claimed B.'s share of the purchase money:—*Held*, that as the order of the court had been consented to by A., and also as it still stood unreversed, it was a good order, and, this being so, the freeholds were properly converted and were now personalty, and that they consequently devolved on B.'s personal representative. JESSEL, M.R., said: “All that *Ackroyd v. Smithson, supra*, decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the court or a trustee sell more than is necessary there is an equity to reconvert the surplus for the benefit of the heir at law of the persons entitled at the time of the sale.” This rule has now been approved by the Court of Appeal in *Burgess v. Booth*, [1908] 2 Ch. 648; but it does not apply to sales of infant's property in a partition action where neither order or sale effects any conversion (*Hopkinson v. Richardson*, [1913] 1 Ch. 284).

It is the practice of the court, however, on sales of property of persons under disability to make such order as may be necessary to prevent the conversion from altering the devolution of the property during disability (Seton, 7th ed., p. 979; and see *Herbert v. Herbert*, [1912] 2 Ch. 268, and *In re Searle*, [1912] 2 Ch. 365).

As stated in the Article, the rule in *Steed v. Preece, supra*, applies to sales by trustees or mortgagees where such sales were in the proper execution of their powers (*In re Grange*, [1907] 1 Ch. 313).

#### PARAGRAPH (2).

This is simply the rule that the improper act of trustees cannot alter in equity the nature of the trust property. If they improperly sell land or improperly invest in land, the cestui que trust and those who claim through him can either reprobate or approbate the transaction (see *supra*, Art. LXV.).

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#### ART. XCII.—*Election to take Converted Property in its actual State.*

Where a person is entitled absolutely to equitably converted property he may elect to take it as converted or in its actual state. His election to take it in its actual state may be shown by his having in fact accepted a transfer of it in that state or by conduct indicating that he does not wish to have its actual state altered. The party who alleges such election is under the burden of proving it.

When the cestui que trust takes the trust property in its actual state from the trustees it is commonly said to be "at home," and however short a period it may be at home amounts to an acceptance of it in its actual condition (*Chandler v. Pocock* (1881), 16 Ch. D. 648).

As for election to take it in its actual condition otherwise than by accepting it from the trustees, all that is necessary is for the person or persons absolutely entitled to show in any way their intention to take it in that condition (*In re Grimthorpe*, [1908] 1 Ch. 668; approved by C. of App., 2 Ch. 675). If the absolute title is vested in more than one person, all interested must join in the election, but they need not be aware that the effect of their election will be to alter the course of devolution of the trust property (*Harcourt v. Seymour* (1851), 2 Sim. (n.s.) 12). A person absolutely entitled in contingency may elect, and when the contingency happens, the property will be bound by his election (*Re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244; cf. *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296). And if the person entitled to elect dealt with the property in its actual state for a considerable time as if he did not desire to have its nature altered, this will be evidence of an election to take it in that state (*Re Gordon* (1877), 6 Ch. D. 531).

**SECTION II.—ELECTION.**

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**ART. XCIII.—*The Doctrine of Election.***

(1) Where by the same instrument a gift of property is made to a donee and a gift of the donee's own property is made to a third person, the court will put the donee to his election either to take the gift made to him and transfer his own property to the third person or to retain his own property and out of the property given to him make compensation for it to the third person ; Provided :

- (i) That the property given to the donee is property of which the donor, and
- (ii) That the property of the donee given to the third person is property of which the donee,

were each entitled freely to dispose.

The principle here stated is what is known as the *equitable doctrine of election*. The ground upon which it is based is thus explained by CHITTY, J., in the leading case of *Re Lord Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466, at p. 473 : "The principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate ; that if he approbates he shall do all in his power to confirm the instrument which he approbates. . . . If a man approbates, his obligation is confined to his adopting the instrument as a whole and abandoning every right inconsistent with

it." If he reprobates, his obligation is confined to making compensation out of the gift made by the instrument to him to the person to whom his property is given by the instrument. It follows from this that in order to give rise to election there must in the first place be property of another person given to the donee out of which he can make compensation in case he reprobates the instrument, and in the second place, property of the donee, which he can transfer in case he approbates the instrument, must be given to a third person (see *In re Booth, Booth v. Robinson*, [1906] 2 Ch. 321).

Taking this general statement of the law, it will be seen that the principle of compensation, in case the donee reprobates or takes against the instrument, distinguishes equitable election from the election a cestui que trust is said to make when he adopts or repudiates an unauthorised investment (see *supra*, Art. LXV.). There if the cestui que trust adopts the investment he loses all right to complain of the breach of trust ; and if he repudiates the investment he loses all right of claiming the unauthorised investment. Again, the same thing distinguishes equitable election from a conditional gift. Where a gift is made to A. of one property on condition he gives another belonging to him to B., if A. refuses to give his property to B., A. has no right whatever to the property given to himself, since he has not performed the condition subject to which it was given.

The same thing may be said to distinguish equitable election from a principle with which it is often confused, that is confirmation of voidable instruments. Instruments *ab initio* void cannot be confirmed (*Harle v. Jarman*, [1895] 2 Ch. 419). All that is meant by confirmation is that by the act or omission of the person who was able to make the instrument absolutely void, it has ceased to be voidable and is binding on all parties. Thus the contract of an infant is not void if it be for his benefit, but he is entitled if he likes to repudiate it on coming of age. If he does not repudiate it within a reasonable time after he comes of age, this will be held a confirmation of it (*Edwards v. Carter*, [1893] A. C. 360). Now if A., an infant bride, enters into a marriage settlement under which B., the husband, settles property for her benefit and she covenants to settle all property subsequently acquired

by her on the trusts of the settlement, this covenant will be held to be for her benefit and therefore voidable only. If then A., after attaining full age, does not repudiate it within a reasonable time, the trustees of the settlement will be entitled to claim her after-acquired property, and she will have no option in the matter (*Viditz v. O'Hagan*. [1900] 2 Ch. 87). If, however, A.'s covenant to settle had been absolutely void *ab initio*, then, without repudiating it on coming of age, she could claim to retain any after-acquired property accruing to her. If she did so a true case of election would arise. Then the court would say if A. claims her after-acquired property contrary to the settlement she must not also retain the benefits she receives under the settlement, but must make compensation out of these to those persons who are damaged by her action (*Re Vardon's Trusts* (1885), 31 Ch. D. 275; *Carter v. Silber*, [1891] 3 Ch. 553 (reversed on another point, [1892] 2 Ch. 278); and see *Codrington v. Codrington* (1875), L. R. 7 H. L. 854).

Next, as to the two essential conditions necessary to raise election, namely, that the donor must give property to the donee and the donee's property must be given to a third person. Not merely must the donor give property, but he must give property of a kind which will constitute it a free benefaction to the donee: otherwise the donee receives nothing out of which he is under any obligation to recompense the third person in case he insists on keeping his own property which the donor has attempted to give away. Thus if A. has a special power to appoint £10,000 among his children, who are to take in default of appointment, and he appoints £9,000 among them and £1,000 to B., who is a stranger to the power, the children will be under no obligation to elect between taking the £9,000 and transferring the £1,000 to B. and repudiating the appointment altogether (*Bristowe v. Ward* (1794), 2 Ves. jun. 336; and cf. *Wollaston v. King* (1869), L. R. 8 Eq. 165). The appointment to B. simply fails for the benefit of the children. It would, however, have been different if A. had left, say, Blackacre—his own property—among the children. Then the children would have to elect either to confirm the appointment to B. or make B. compensation for not doing so, to the value, at any rate, of Blackacre (*Whistler v.*

*Webster* (1794), 2 Ves. jun. 366). Again, if A., a land-owner in a country where the law does not permit the devise of land, devised his land to B. and C., then whether the heirs of A., who on his death became the owners of his lands, would be entitled to claim such lands without making any compensation to B. and C. would depend on whether A. has by his will left other property of his own to such heirs. If he has, they must compensate or give the lands to B. and C.; if he has not, there is no fund out of which B. and C. can claim compensation (*Haynes v. Foster*, [1901] 1 Ch. 361). This rule applies to all gifts, whether under special trusts or not, which fail: the persons entitled on failure must elect between confirming any gift given them and the gift which has failed—even though the result of the election may be to benefit, not the object of the donor's bounty, but merely that person's residuary legatee (*Re Brooksbank* (1886), 34 Ch. D. 160). This rule does not apply to cases where the donor has attempted to do something contrary to law, as for instance where he has appointed property under a special trust to strangers in such a way as to create a perpetuity and given the objects of the trust another property (*In re Nash*, [1910] 1 Ch. 1), *sed quare*.

The second essential condition to raise election, is that not merely must the donee's property be given to a third person, but the property so given must be property which the donee is able to transfer to the third person. Otherwise, if he chooses to take under the instrument there is nothing which he can give up. Thus, in *Re Lord Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466, a testator left certain chattels in trust for his two sons and his residuary estate to the eldest son. Now, the chattels left to the two sons were in fact heirlooms, or, more correctly, chattels settled to accompany the family mansion, of which the eldest son was only tenant for life. The eldest son, therefore, could not transfer any of them to his brother:—*Held*, that in consequence he could not be put to his election either to transfer them or to recompense his brother for not doing so out of the residuary estate.

Election was formerly confined to gifts by will. It now, however, applies also to gifts under settlements both *ante-* and *post-nuptial*. It arises only where the two gifts are

contained in the same instrument ; but for this purpose a marriage settlement, though contained in more than one document, is regarded as a single instrument (*Codrington v. Codrington, supra*).

When the election arises under a will, the rights of the parties become fixed at the testator's death : when under a deed, when the party to elect is in the enjoyment of both properties and is competent to elect. Accordingly, if election does not take place until some time after these periods and before then a change has taken place in the parties' positions, the court will disregard this change (*Haynes v. Foster*, [1901] 1 Ch. 361 ; *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16).

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#### ART. XCIV.—*How far Doctrine is based on Intention.*

In order that the doctrine of election may apply, it is not necessary to show that the donor intended to put the donee to his election ; but if it appears that he did *not* intend to put the donee to his election, it does not apply.

Where the donee is a married woman, the fact that the gift to her is made subject to a restraint upon anticipation is a sufficient indication of an intention that she was not to elect.

Election is not based upon any actual intention on the part of the donor. It is based simply on the rule of construction that the maker of an instrument presumably intends that all parts of it should be carried into effect. Accordingly—at any rate, in a will—it is immaterial whether the donor knew that the property he gives to the third person is the donee's or not (*Cooper v. Cooper* (1874), L. R. 7 H. L. 53). It is, however, necessary that the testator should clearly intend to give the property away

whether he knows it is the donee's or not. This is important, since in the case of wills the presumption is that the testator intends to give away only what is his own property, and so if there is any ambiguity as to the property intended to be given, the court will hold it was not his intention to give away the donee's property (*Wintour v. Clifton* (1856), 8 De G. M. & G. 641).

But though election is not based upon any actual intention on the part of the donor, still the expression by the donor of an intention that the donee shall not be put to his election excludes it. Such an intention is seldom or never stated in so many words, and where it is so stated no difficulty arises. The difficulty arises where the court has to gather the actual intention from the form in which the gift to the donee is made. It has been held that where the gift is to a married woman, and is made without power of anticipation, this is sufficient to indicate that the donor did not intend her to elect, since an election to keep her own property and make compensation for it out of the gift would have the effect of doing away with the restraint which the donor intended should affect the gift to her (*Re Vardon's Trusts, supra*). Thus, in *Haynes v. Foster* (the facts of which are cited at p. 232), the testator besides attempting to devise his land in Turkey, gave a married daughter, who was one of his heirs, a share in his residuary estate, subject to a restraint upon anticipation. The devise of the land being void by Turkish law, the persons disappointed sought to make the married daughter elect either to affirm the devise or compensate them out of her share of the residuary estate:—*Held*, that the restraint on anticipation showed an intention on the testator's part inconsistent with the application of the doctrine of election. In *Smith v. Lucas* (1881), 18 Ch. D. 531, JESSEL, M.R., seemed inclined to hold that in such a case the married woman could not elect, on the ground that if she elected against the gift she could not make compensation out of the gift, and this, it is submitted, is the better ground on which to place the matter.

### SECTION III.—PERFORMANCE, SATISFACTION, AND ADEMPTION.

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#### ART. XCV.—*Definitions of Performance, Satisfaction, and Ademption.*

For the purposes of this sub-section—

*Performance* means a transfer of property which whether the donee wishes it or not, operates in law as a complete or *pro tanto* discharge of a previous legal liability of the donor ;

*Satisfaction* means a transfer of property which, if the donee accepts it, operates in law as a complete or *pro tanto* discharge of a previous legal liability of the donor ; and

*Ademption* means a transfer of property which, whether the donee wishes it or not, operates in law as a complete or *pro tanto* substitution for a gift previously made by the donor's will, and unrevoked at his death.

Thus A. covenants on his marriage to purchase and settle lands to the value of £10,000 on his wife B. He

purchases lands to the value of £5,000, and so settles them. This is *performance* in part of his liability under the covenant, and B. has no option but to accept it as such.

Again, A. covenants on the marriage of his son to give £10,000 to X. By his will A. leaves to X. one-third part of his residuary estate. This is a *satisfaction* of A.'s liability under the covenant if X. accepts it. But X. is under no obligation to accept the share of the residue as a discharge of A.'s estate. He can insist on receiving out of such estate the £10,000, the amount A. covenanted to pay him.

Again, A. by his will leaves his daughter Y. one-third of his residuary estate. Subsequently, on Y.'s marriage, he settles £10,000 upon her. A. dies without having altered or revoked his will. The £10,000 is an *ademption* of the gift of one-third of A.'s residuary estate. Y. has no option in the matter. If she claims anything under the will, she must bring into account the £10,000 she received under the settlement as part of what she is entitled to receive under A.'s will.

Formerly it was thought that in cases of satisfaction and ademption the donee's acceptance of the second gift constituted a complete forfeiture of his right under the covenant or will. It is now settled, however, that this is so only where the second gift is of a value equal to or greater than the value of such right. Where it is of less value it works a forfeiture only to the extent of its value (*Pym v. Lockyer* (1841), 5 My. & C. 29; *Re Pollock*, *Pollock v. Worrall* (1885), 28 Ch. D. 552).

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#### ART. XCVI.—*Presumption as to Performance.*

(1) Where a person covenants for valuable consideration to purchase and settle lands upon certain trusts, and subsequently purchases lands of the nature of those covenanted to be purchased and settled, equity, if he retains such

lands unsettled till his death, will presume that such lands were purchased in performance of the covenant and are bound by it.

(2) Where a person covenants for valuable consideration to leave by will to or in trust for a certain person, a legacy or a proportionate part of his personality, and subsequently dies intestate, equity will presume that any share of the covenantor's estate received by such person under the intestacy is a complete or *pro tanto* performance of the covenant.

#### PARAGRAPH (1).

A covenant for value to purchase and settle lands generally creates simply a specialty debt. It does not create a specific lien or charge upon lands purchased in pursuance of it and not settled. Formerly, when a testator's lands were answerable only for specialty debts in which the heir was bound (see *infra*, p. 494), and all specialty debts were payable out of personality in preference to simple contract debts (see *infra*, p. 518), the doctrine of performance, as stated in the Article, had an importance it does not now possess. A covenant to purchase and settle *specific* lands, on the other hand, probably does create a lien on such lands when purchased and not settled. But as to such covenants, the Bankruptcy Act, 1883, sect. 47, provides that, on the covenantor's bankruptcy, the covenant is void save in so far as the lands have been actually conveyed before the bankruptcy (*supra*, p. 75).

The doctrine is now useful chiefly to prevent heirs claiming what in effect are double portions. A good example of its operation in this way is the case of *Wilcocks v. Wilcocks* (1706), 2 Vern. 558. There A., in consideration of marriage, covenanted to purchase and settle lands of the value of £200 a year on his wife for life, and the first and other sons of the marriage in tail. He purchased lands of this value but did not settle them. He died intestate. A.'s eldest son succeeded as heir to

the lands purchased. He brought an action to have the covenant to purchase and settle lands enforced:—*Held*, that the lands descended to him constituted a performance of the covenant.

If the covenant is to purchase freehold lands, it is not performed by the purchase of leaseholds or copyholds, but a smaller purchase of lands of the kind to be settled is *pro tanto* a performance of the covenant (*Lechmere v. Earl of Carlisle* (1735), 3 P. Wms. 228). And a purchase of lands by the covenantor without consulting the trustees is a performance of a covenant to purchase with the consent of the trustees (*ibid.*), or of a covenant to pay money to trustees to be expended in the purchase, with the covenantor's consent, of lands to be settled (*Sowden v. Sowden* (1785), 1 Bro. C. C. 582). And where lands are purchased in performance of a covenant to settle, they will be bound by it if they descend to the heir (*Denton v. Davies* (1812), 18 Ves. 499); or if the covenantor mortgages them, the equity of redemption will be bound (*Ex parte Poole* (1847), 1 De G. 581).

#### PARAGRAPH (2).

In *Goldsmid v. Goldsmid* (1818), 1 Swanst. 211, a testator who, under his marriage articles, had covenanted that if he died in the lifetime of his wife his executors would, within three months of his decease, pay her £3,000, died in his wife's lifetime. By his will he left all his property to his executors, with a direction to pay his debts, and, at the expiration of three years from his decease, distribute the residue of his estate in such way as seemed to them right. The executors all either pre-deceased the testator or renounced, and the residue became consequently divisible under the Statute of Distributions:—*Held*, that the rule stated in this paragraph (called usually the rule in *Blandy v. Widmore* (1716), 1 P. Wms. 323) applied to this partial intestacy as much as to a complete intestacy, and that the widow's distributive share of the residue was a performance of the covenant.

The rule does not apply where the liability is a liability arising during the lifetime of the covenantor—such as where the covenant is to settle a sum two years after

marriage, and the settlor lives over two years and does not make the settlement. Here, on breach of the covenant, the obligation becomes a debt, and must, like other debts, be paid before the intestate's estate is distributed under the statute (*Garthshore v. Chalie* (1804), 10 Ves. 1). Nor does it apply where the liability undertaken cannot be covered by the payment of a gross sum—*e.g.*, where the covenant is to pay the covenantee an annuity for life (*Salisbury v. Salisbury* (1848), 6 Hare, 526).

A covenant to leave a legacy or a specific proportion or the whole of the covenantor's estate to certain persons creates no lien on the estate. The covenantor is perfectly entitled to deal freely with his property during his lifetime, the liability affecting his estate only after his death.

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#### ART. XCVII.—*Satisfaction of Debts.*

Where a testator having contracted a debt before the date of his will dies without having paid it, and by his will leaves his creditor a pecuniary legacy equal to or greater than the amount of the debt, and in every other respect as advantageous to the creditor as the debt was, equity, in the absence of anything to show a contrary intention, will presume that the testator intended the legacy to be in satisfaction of the debt.

The rule here stated was first established in 1714 by the decision in *Sir John Talbot v. Duke of Shrewsbury*, Prec. Ch. 394. "No sooner," in the words of STIRLING, J., in *Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516, "was it invented than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it." This was because it was felt that to establish a general presumption that every legacy left by a debtor to a creditor is intended to be in payment of the debt is carrying much too far the sensible doctrine that a debtor is not presumed to give (*Debitor non presumitur donare*).

The chief ways invented by the judges to get out of it were these: In the first place, they held that no satisfaction of a debt *pro tanto* could be presumed. The legacy must be either equal to or greater than the debt, or the creditor could claim both debt and legacy (*Graham v. Graham* (1791), 1 Ves. 272). In the second place, a legacy could not be presumed to be in satisfaction of a debt which had no existence when the will was made (*Thomas v. Bennet* (1725), 2 P. Wms. 341). In the third place, to raise the presumption it must be clear that the legacy is at least as advantageous to the creditor as the debt was. This condition strictly applied would pretty well have disposed of the rule, since debts are payable immediately, and legacies, unless otherwise directed by the will, cannot as a rule be recovered till twelve months after the testator's death, and a difference in time of payment is a disadvantage (*Re Horlock, Calham v. Smith, supra*). Other disadvantages arise where the legacy is contingent, or uncertain or less easily recoverable, as where the debt is secured by bond or negotiable instrument (*Chancey's Case* (1717), 1 P. Wms. 408). In the fourth place, it was held that the fact that the will contains a direction to pay debts, or to pay debts and legacies, is a sufficient indication of the testator's intention that the legacy is not to be taken as a satisfaction of the debt (*Re Huish, Brulshaw v. Huish* (1889), 43 Ch. D. 260; *Chancey's Case, supra*).

Some of these difficulties have been got over by holding that a legacy to a creditor of the testator (where it is held to be in satisfaction of the debt) is to be treated as a debt due to him on which interest is payable from the death of the testator (*In re Rattenberry*, [1906] 1 Ch. 667). But still the chief cases now where the doctrine applies are where on the facts it clearly was the testator's actual intention that the donee should take the legacy in satisfaction of the debt. Thus, in *Re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373, a husband owed his wife £625. Subsequently to incurring this debt he made his will and left a legacy to his wife of £625. Before he died, he repaid the £625 debt:—*Held*, that the legacy was intended in satisfaction of the debt, and the debt having been paid by the testator in his life-time, the legacy was thereby adeemed (and see *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595).

The limited rule stated in the Article applies equally where the debtor is the father of the creditor, provided the debt is not created by the father by way of portion for the child (see Art. XCIX.). And it applies to gifts *inter vivos* as well as to legacies, where the question arises after the donor is dead. Thus where a father appropriated to his own use part of trust funds settled on himself for life and then on his children, it was held that a settlement of a smaller sum by the father on the child on marriage was no satisfaction of the debt to the child created by the breach of trust (*Crichton v. Crichton*, [1895] 2 Ch. 853; reversed on another point, [1896] 1 Ch. 870).

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### ART. XCVIII.—*Ademption of Legacies.*

Where a legacy appears on the face of a will to be bequeathed for a particular purpose (not being a portion within the next Article), and a subsequent gift appears to have been made for the same purpose, a presumption arises that the second gift was intended to adeem the legacy either completely or in part.

This is adapted from the language of Lord SELBORNE, L.C., in *In re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. 552, at p. 556. He proceeds thus: “To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator’s view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist.” His lordship is here referring to the natural duty of a father to provide for his children, dealt with in the next Article.

The case of *In re Pollock, Pollock v. Worrall (supra)* is itself a good example of this expressed moral duty. There a widow by her will left £500 to her husband's niece, "according to the wish of my late beloved husband." Afterwards she asked the niece whether she would prefer a smaller sum down to a larger sum on the widow's death. The niece expressed a preference for a smaller sum down, and the widow gave her £300. On the widow's death, the legacy of £500 was held to be adeemed to the extent of £300.

Two recent cases will illustrate the difference between spontaneous bounty and a particular purpose not based on a moral duty.

In *In re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259, a testator, not *in loco parentis* to the beneficiary, gave a legacy to a trustee for the benefit of the beneficiary. Subsequently he made a gift to the trustee of the same sum for the same purpose:—*Held*, that the gift being simply for the benefit of the beneficiary, it was simply a gift to him for no particular purpose, and so it did not adeem the legacy for his benefit.

On the other hand, in *Re Corbett, Corbett v. Lord Cobham*, [1903] 2 Ch. 326, a testator left £10,000 to the trustees of "the endowment fund of C. Hospital." Subsequently he wrote to the trustees saying he wished to redeem a promise to give £10,000 to the endowment fund of C. hospital and sent a cheque for this amount:—*Held*, that the gift being for a particular purpose and that purpose being the same as that for which the legacy was given, it adeemed such legacy.

Sometimes a legacy is said to be adeemed by a subsequent legacy. Strictly speaking this is altogether incorrect. When two legacies of the same amount are given to the same person in the same will, the question arising is, whether or not the testator was in both cases referring to the same legacy or to different legacies. It will be presumed that he was referring merely to the same legacy if the two legacies are of equal amount and given to the same person, and by the same will or same codicil, or, if by separate instruments, they are, in addition, expressed

to be given from the same motive (see Under. & Stra. *Inter. of Wills*, p. 193).

It should be noted that a *donatio mortis causâ* is not deemed by a subsequent legacy of the same value as the *donatio*. Thus, in *Hudson v. Spencer*, [1910] 2 Ch. 285, A. in his last illness gave B. as a *donatio* scrip representing securities of a certain value. Subsequently he made his will by which he left B. a legacy of the same value :—*Held*, that B. was entitled to both the securities and the legacy.

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#### ART. XCIX.—*Definition of “Portion.”*

(1) By *portion* is meant a gift made by a father of his own property, or of settled property over which he has a power of appointment among his children, to or for the benefit of a lawful child for the purpose of discharging the moral obligation of the father to provide for the child.

(2) *Prima facie* all gifts by will to a child, all settlements made on a child on marriage, all moneys expended in establishing a child in a profession or business, and all considerable lump sums given without a specific purpose to a child are portions. Sums, however, given to a child for the payment of his debts, and small gifts made to a child from time to time without a specific purpose, are not to be regarded as portions, but rather as temporary assistance, unless it appears that the father intended them to be regarded as portions.

(3) A person who shows that he has taken upon himself towards a person who is not his child the moral obligation of a father, is said

to be a person *in loco parentis* to such person. Gifts, which if made by a father would be portions, are portions if made by a person *in loco parentis* to the donee.

(4) A mother, as mother, is not under the moral obligation of a father to provide for her child, and *prima facie* no gifts by her to the child are portions.

(5) Portions given to a child during his father's life are called *advancements*.

#### PARAGRAPHS (1) AND (2).

In *Taylor v. Taylor* (1875), L. R. 20 Eq. 155, at p. 157, JESSEL, M.R., thus describes what is to be considered a portion : "I have always understood that an advancement by way of portion is something given by a parent to establish the child in life, or to make what is called a provision for him. . . . If in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him ; but if a small sum is so given you may require evidence to show the purpose. . . . Not every payment is a provision for the child ; and I think that Wood, V.-C., referred to that when he said, in *Boyd v. Boyd* (1867), L. R. 4 Eq. 305, that the sum must be paid for a particular purpose ; by which I understand him to mean a special purpose with a view to the establishment of the child in life." And the money may be either the father's own property or property settled to provide for his family over which he has a special power of appointment (*In re Shields*, [1912] 1 Ch. 591).

This statement of the law, which was not followed by PEARSON, J., in *Re Blockley* (1885), 29 Ch. D. 250, has been expressly approved by the Court of Appeal in *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1.

As examples of portions, JESSEL, M.R., in *Taylor v. Taylor* (*supra*), gives these among others : a marriage

settlement, payments for putting a son into a business or profession, buying a commission for him in the Army, buying for him the goodwill and stock-in-trade of a business (*ibid.*, p. 157).

It is to be noted that in order that a provision by a father for his child should be a portion, the child must be his lawful child. An illegitimate child is in law *nullius filius*, and so a stranger to the father. This often causes the rule against double portions, which we shall next discuss, to work out very unfairly as between legitimate and illegitimate children of the same father (*Ex parte Pye* (1811), 18 Ves. 140).

#### PARAGRAPH (3).

In order that a person may be *in loco parentis* for the purpose of this and the following Article, it is necessary to show that he intended to assume the duty of a lawful father to provide for the child (*Ex parte Pye* (1811), 18 Ves. 154). "The offices and duties of a parent are," says Lord COTTFENHAM, in *Powys v. Mansfield* (1837), 3 My. & Cr. 359, at p. 366, "infinitely various, some having no connection whatever with making a provision for a child ; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. . . . The rule, both as applied to a father and to one *in loco parentis*, is founded on the presumed intention. . . . The having so acted towards a child as to raise a moral obligation to provide for it affords a strong inference in favour of the fact of the assumption of the character ; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it ; but neither are (*sic*) conclusive."

#### PARAGRAPH (4).

A mother is not under the same moral obligation as a father to provide for her children, and therefore gifts by her to them are *prima facie* not portions (*Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574). But, like any

other person, she may assume the obligations of a father, in which case the rule applicable to persons *in loco parentis* will apply to her (*ibid.*, at p. 578).

#### PARAGRAPH (5).

An advancement usually means giving property to the child, and especially money. But it also includes entering into a liability to give him money or money's worth. Thus a covenant to settle a sum of money is an advancement which, if the child claims performance of it against his father's estate, is equivalent to the advance of the money itself (*Cooper v. Macdonald* (1873), L. R. 16 Eq. 258).

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#### ART. C.—*Satisfaction and Ademption of Portions.*

(1) Where a portion is given to a child by will and subsequently an advancement by gift or covenant is made to the same child, or where an advancement by covenant (but not by gift) is made to a child, and subsequently a portion is given to the same child by will, there is a presumption that the portion, in the first case, is adeemed by the advancement, and the advancement, in the second case, is satisfied by the portion either wholly or *pro tanto*, as the case may be.

(2) This presumption will be rebutted if the portion by will and the advancement differ substantially—

- (i) in the nature of the property given;
- (ii) in the nature of the limitation of the gifts;
- (iii) in the nature of the conditions affecting the gifts.

## PARAGRAPH (1).

The rule here stated is what is called the presumption against double portions. Whatever may have been the original reason for raising this presumption (and probably it was to prevent too many portions being fixed upon the father's lands in the hands of his heir), it is now useful—if useful at all—chiefly for preventing one child being favoured at the expense of the others. An example or two will show how far the rule has been carried.

Thus, in *Montagu v. Earl of Sandwich* (1886), 32 Ch. D. 525, Lord S. by deed charged his estates with an annuity of £1,000 in favour of his second son. Subsequently he devised, subject to all charges, the estates to his eldest son. He also bequeathed to his second son personalty of a value of more than £1,000 per annum:—*Held*, that the bequest was a satisfaction of the charge of £1,000 upon the real estate. And see *In re Lawes* (1881), 20 Ch. D. 81.

Again, in *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728, a testator bequeathed a legacy to one of his children. Subsequently, on the marriage of this child, he settled certain moneys on her. After this advancement he added a codicil to his will, but did not alter the legacy to the child advanced:—*Held*, nevertheless, that the advancement made was an ademption of the legacy.

Again, in *McCarogher v. Whieldon* (1866), L. R. 3 Eq. 236, a father covenanted on his son's marriage to settle a certain sum upon him and his wife and children. Subsequently, the father by his will left a legacy to the son:—*Held*, that this legacy was a satisfaction of the covenants as far as the son was concerned, although it was not a satisfaction as regarded the wife and children. Cf. *Lord Chichester v. Coventry* (1867), L. R. 2 H. L. 71.

A covenant to settle may in the same way constitute an ademption of a portion given previously by the father's will (*Cooper v. Macdonald* (1873), L. R. 16 Eq. 258).

Where the residuary estate is divided between the children of the testator and a stranger, then if one of the children is subsequently advanced, this advancement will not be brought into account so as to benefit the stranger. The stranger will first receive his share of the residue, and then when the child who has been advanced claims a share of what remains he will have to bring the advancement into hotchpot in favour of the other children (*Meinhertzagen v. Walters* (1872), L. R. 7 Ch. 670). If a legacy not residuary given to a child is adeemed, then all the residuary legatees, whether children or strangers, share the benefit ; but if the child receiving the legacy is also one of the residuary legatees the strangers will not be allowed to benefit by the ademption of the legacy (*In re Heather, Pumfrey v. Fryer*, [1906] 2 Ch. 230).

A direction in the will that the testator's debts are to be paid will not prevent an advancement by covenant being satisfied by a legacy (*Cooper v. MacDonald* (1873), L. R. 16 Eq. 258).

#### PARAGRAPH (2).

The differences which will rebut the presumption that a second portion was intended to satisfy or adeem a previous portion must be such as to make it either—(i) a gift of a different thing ; (ii) a gift to substantially different persons ; or (iii) a gift subject to substantially different conditions. It should be noted that smaller differences will suffice to rebut the presumption of satisfaction than are necessary to rebut the presumption of ademption (*Tussaud v. Tussaud* (1878), 9 Ch. D. 363).

As to differences in the nature of the property, the gift of land *inter vivos* will not adeem a legacy of money. The thing given to be a satisfaction must be *ejusdem generis* with the gift which it is to satisfy (*Re Jacques, Hodgson v. Braisby*, [1903] 1 Ch. 267).

In the same way the gift of a share in the father's business may adeem a legacy, but it would seem that this is the case only when the share of the business was fixed at a money value when the gift was made (see *Re Lawes* (1881), 20 Ch. D. 81 ; and cf. *Re Vickers* (1888), 37 Ch. D. 525 ; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482).

As to other differences see *Tussaud v. Tussaud, supra*. There T., on the marriage of his daughter W., covenanted that his executors would settle within six months of T.'s death £2,000, to be held in trust for W.'s appointees, and in default of and until appointment for W. for life for her separate use, then for her husband for life, and on the death of the survivor for the children of the marriage. During his life T. handed £1,000 to the trustees of the settlement, which was a performance in part of the covenant. On his death, he left £2,800 to the trustees in trust for W. for life for her separate use without power of anticipation, then for her children who attained twenty-one years, and in default of such children for T.'s sons :—*Held*, that this was no satisfaction of his covenant, and that the trustees were entitled to recover the £1,000 covenanted to be settled from T.'s executors, and at the same time retain the legacy of £2,800. And see *Re Furness*, [1901] 2 Ch. 346.

A covenant, however, to settle a portion on a child and her family may be satisfied as to the child's life interest by a legacy to her absolutely. Thus, in *In re Blundell*, [1906] 2 Ch. 222, a father on his daughter's marriage covenanted to pay the trustees of her settlement a certain sum to be settled on the daughter for life, then on the husband for life, and then on the children of the marriage absolutely. He afterwards lent the daughter £3,000 and by his will he left her absolutely a third of his residuary estate, she to bring the £3,000 lent into hotchpot. Her settlement contained a covenant to settle after-acquired property, and her share of residue exceeded the sum covenanted to be settled :—*Held*, that the legacy to the daughter was a satisfaction of the covenant only as regarded her life interest since her husband and children did not take directly any share in it. And see *McCarogher v. Whieldon, supra*, p. 247.

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#### ART. CI.—*Admission of Parol Evidence.*

Where any question of performance, satisfaction, or ademption arises, the court will, as to

the admission of parol evidence, proceed upon the following rules :

- (1) Where both transactions are contained in written instruments, if the court, on construing such instruments—
  - (a) holds that the second transaction was not a performance, satisfaction, or ademption of the earlier liability or gift, it will not admit parol evidence of the donor's actual intention ;
  - (b) holds that there is a presumption that the second transaction was intended as a performance, satisfaction, or ademption of the earlier liability or gift, it will admit all relevant parol evidence of the donor's actual intention to rebut or support such presumption.
- (2) Where one of the transactions is not contained in a written instrument, the court will admit all relevant parol evidence to show the donor's actual intention in entering into that transaction.

This is the rule as laid down by Sir EDWARD SUGDEN (Lord St. Leonards) in *Hall v. Hill* (1841), 1 Dr. & War. 132. It is simply an application of the general principle that where on the construction of written instruments the court presumes a meaning not expressed in the documents, it will admit parol evidence to rebut such presumption, and where it admits evidence to rebut it will also admit evidence to support it.

The rule against double portions is merely a presumption as to the intention of the father. Where parol evidence is admitted, and this shows that the father did not, in fact, intend a portion or advancement to be adeemed or satisfied

by a subsequent advancement or portion, then the rule has no application (*Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482).

The evidence most relevant is evidence of the declarations made by the father at the time the gifts were made (*ibid.*).

It may be noted that a letter left by a testator of declaring his intention that a gift made to a legatee during the testator's life was intended to adeem the legacy is not admissible as evidence of such intention after the testator's death if during his life it was not communicated to the legatee (or *semble*, otherwise published). Thus, in *In re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591, a testator left by will £300 to his housekeeper. He subsequently gave her £300, and told her to hand a sealed letter to his executors after his death. When the executors opened the letter they found it contained a declaration that the £300 given was to adeem the legacy:—*Held*, that the letter was not admissible in evidence, and that the legacy was not adeemed by the gift.

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## SECTION IV.—PART PERFORMANCE AND RECTIFICATION.

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### ART. CII.—*Part Performance of Agreements not in Writing.*

(1) Where an agreement coming within sect. 4 of the Statute of Frauds, 1677, is otherwise valid, and is one which the court would specifically enforce, the court will, on the application of a party to it who has part performed it, specifically enforce it, notwithstanding that it has not been reduced into writing signed by the party to be charged as required by that section.

(2) An act done by a party in pursuance of the contract in order to be a part performance of it, must be one which could not be done with any other view or design than to perform it, and could not be undone without causing the party unliquidated damage.

#### PARAGRAPH (1).

This rule is an attempt to state shortly what is called the doctrine of *part performance*. That doctrine is akin to the one stated in Art. XXIII. as to the declaration of trusts—namely, that equity will not allow the Statute of Frauds to be itself made a shield for fraud. Thus, as stated by Lord CRANWORTH, L.C., in *Caton v. Caton*

(1866), L. R. 1 Ch. 137, at p. 148, "When one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend money."

In order that the doctrine may apply the agreement must, in the first place, be one which would be valid (*i.e.*, enforceable), if it had been evidenced in writing. Where the agreement is one contrary to law, however it may be evidenced, no difficulty arises. The difficulty arises in respect to agreements not contrary to law, but which according to law can be validly made only in a certain way. Thus, for instance, municipal corporations cannot by law contract for the purchase or sale of land except by instrument under their common seal. Accordingly a parol agreement to buy or sell land by a municipal corporation is in law no contract at all. From this it would seem to follow that notwithstanding part performance, an agreement not under seal to buy or sell land could not be specifically enforced in favour of or against such a corporation. The courts, however, have held that it can be enforced against the corporation (*Crook v. Corporation of Seaford* (1870), L. R. 10 Eq. 678). And if so, there seems to be no good reason, except perhaps that the want of a seal is due to its own negligence, why it should not be enforced in favour of the corporation (see *Oxford Corporation v. Crow*, [1893] 3 Ch. 534).

In the second place, the agreement must not merely be one valid but for the want of writing, but must also be one which the court would, if it was in accordance with that section, specifically enforce. The section refers to various agreements—namely, agreements of executors to answer damages out of their own estate, agreements to guarantee other persons' debts or defaults, agreements in consideration of marriage, contracts or sales "of lands, tenements, or hereditaments, or any interest in or concerning them," and agreements not to be performed

within a year. Among these, contracts for sales of lands or interests in them are the only ones which equity usually specifically enforces, and in some of the cases it is laid down that these are the only agreements to which the doctrine of part performance applies (*Britain v. Rossiter* (1879), 11 Q. B. D. 123). This view is questioned, however, by Lord SELBORNE, L.C., in *Maddison v. Alderson* (1883), 8 App. Cas. 467, at p. 474. And it is laid down by KAY, J., in *McManus v. Cooke* (1887), 35 Ch. D. 681, at p. 697, that "probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing" (as to which see *infra*, Art. CLX.). He adds, however, that "the most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement." In *McManus v. Cooke* he held that a parol agreement for an easement, though an easement is not an interest in land within sect. 4 of the Statute of Frauds, 1677, was capable of being part performed so as to make it specifically enforceable.

In the third place, the party who applies for specific performance of the parol agreement must be a party who has part performed it. The part performance by one party gives the other party no rights. As a rule, most acts of part performance are the acts of both parties, as, for example, the delivery and acceptance of possession of the land agreed to be dealt with (*Attorney-General v. Biphosphated Guano Company* (1878), 11 Ch. D. 327, at p. 331). But where the part performance is by one party only, he alone can claim specific performance on the strength of it. Thus, in *Caton v. Caton* (1866), L. R. 1 Ch. 137, A. and B., about to marry, agreed in writing that A., the husband, should have the wife's property for his life, he allowing her £80 a year pin money and she having it at his death. Subsequently after marriage they agreed verbally that there should be no settlement by deed, and that A. should by his will leave to B. the property which accrued to A. in her right. He made a will to this effect, but subsequently revoked it:—*Held*, that the execution of the first will by A. was no part performance to bring the parol agreement within the

rule, as no “consequence can be attached to acts of part performance by the party sought to be charged.”

### PARAGRAPH (2).

Acts done in pursuance of the parol agreement, in order to constitute part performance of it within the rule, must, in the words of Lord HARDWICKE in *Gunter v. Halsey* (1739), Amb. 586, “be such as could be done with no other view or design than to perform the agreement, the terms of which must be certainly proved.” Or, as expressed by Lord SELBORNE in *Maddison v. Alderson* (1883), 8 App. Cas. 467, at p. 479, “All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged.”

Thus, for example, the letting of a purchaser or tenant under a parol agreement into possession of the land is an act of part performance on the part of both parties (*Attorney-General v. Biphosphated Guano Company, supra*). The permitting, however, a tenant in possession to remain in possession after his tenancy has determined is an equivocal act (*Wills v. Stradling* (1797), 3 Ves. 378), unless qualified by the payment of a different rent (*Miller and Aldworth, Limited v. Sharp*, [1899] 1 Ch. 622) or some other variation of incident. Again, where there is a parol agreement between A. and B. that A. shall build a house on A.’s land according to a certain plan on condition that B. shall, on completion, buy the land and house at a certain price, A.’s building the house is an equivocal act (*per KEKEWICH, J., in Dickenson v. Barrow*, [1904] 2 Ch. 339, at p. 343; but cf. *per Lord CRANWORTH in Caton v. Caton, supra*). If, however, B., while A. was building the house, inspected it from time to time and gave directions for alterations which A. carried out, then obeying such directions would be sufficient part performance (*Dickenson v. Barrow, supra*). Investigation of title or other preliminary acts are equivocal, and so is payment of a part, or, it would seem, the whole of the purchase money (*Clinun v. Cooke* (1802), 1 Sch. & Lef. 20), though Lord HARDWICKE held otherwise (*Lacon v. Mertens* (1743), 3 Atk. 1). The ground upon which the

payment of the purchase money is held to be equivocal is not very clear. It would be, perhaps, better to place it on the ground on which it is put in the Article—namely, as an act which does not, on being undone, cause the doer unliquidated damage. On repayment with interest of the purchase money the party paying it is precisely in the same position as he was before he entered into the parol agreement. In all cases where an act has been held sufficient part performance the party has altered his position in consequence of the parol agreement in a way which cannot be assessed accurately in money loss. Such acts, as said by Lord SELBORNE in *Maddison v. Alderson* (1886), 8 App. Cas., at p. 480, “have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land.”

As showing the weight put by the court upon the first of these (possession), the case of *Hodson v. Heuland*, [1896] 2 Ch. 428, may be referred to. There a contract for a lease of land for more than three years was drafted but never signed, as required by sect. 4. Before the date of the contract, and therefore not in pursuance of it, the intended lessee had been let into possession, and he continued in possession after the date and paid rent in accordance with the draft lease. It was held that the continuing in possession and payment of rent after the date of the contract was a part performance of it.

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ART. CIII.—*Rectification of Instruments in Writing inaccurately expressed.*

(1) Where one or several persons with the object of carrying out a definite intention executes or execute a legal instrument, if such instrument, through being inaccurately expressed, fails to carry out accurately such intention, the court will, on the application of one or all of the persons party thereto and on evidence clearly establishing the intention, rectify the instrument.

(2) Where the instrument is intended finally to settle the rights of the parties thereto, parol evidence as to the intention will be admitted even though the transaction intended to be carried out is one an agreement as to which should, under the Statute of Frauds, 1677, be evidenced in writing.

#### PARAGRAPH (1).

Rectification or reformation of written instruments is usually discussed as part of the law as to mistakes of fact. There are, no doubt, two kinds of mistakes of fact : mistakes as to the expression of the intention, and mistakes as to the subject-matter of the transaction (see *infra*, Art. CVI.). But rectification is not always based on mistake. It is based simply upon this ground : that an instrument which for any reason—say, the fraud or ignorance of the draftsman—does not express the intention of the parties to it will be rectified if the intention can be proved. Thus, in *Cogan v. Duffield* (1876), 2 Ch. D. 44, it was agreed by marriage articles to settle certain moneys. When the settlement came to be drafted the draftsmen introduced limitations into it different from those which the court would, under the circumstances, presume to be intended by the parties (see *supra*, Art. XXV.) :—*Held*, that the settlement must be rectified.

By statute some instruments, however much they fail to express the real intention of the maker of or parties to them, cannot be rectified, as, for example, wills and articles of association (*Evans v. Chapman*, [1902] W. N. 78). Such instruments may be voidable through their execution being obtained by fraud, but they cannot be altered by the court on the ground that they do not express the real intention of the parties to them.

As appears from the Article, in order that the court may order rectification three conditions must be fulfilled.

In the first place, the intention must be definite. If the intention is not definite, there is nothing by which the court is able to rectify the instrument. A person who,

when executing an instrument, does not know clearly his own mind must be presumed to mean what the instrument he executes expresses. An exception to this occurs in cases like *Cogan v. Duffield*, *supra*, where the court presumes parties entertain definite intentions which in fact they, as a rule, do not entertain. Again, where there are two or more parties to the instrument, the intention to be definite must, of course, be the common intention of all the parties (*Bentley v. Mackay* (1862), 4 De G. F. & J. 279).

In the second place, the definite intention must subsist at the time of execution. Where documentary evidence exists of the parties' intention some time preceding the execution of the instrument, then this will be *prima facie* evidence of the intention of the parties when the instrument was executed. Thus, if a marriage settlement made after marriage is not in accordance with articles executed before it, the court will, in the absence of express evidence of a change of intention, rectify the settlement to agree with the articles (*Tucker v. Bennett* (1887), 38 Ch. D. 1). But if the subsequent settlement shows that disputes have occurred as to the meaning of the articles and that all the parties have agreed to the settlement as a compromise, then the fact that the settlement is not in accordance with the articles is not a ground for rectification (*Fowler v. Fowler* (1859), 4 De G. & J. 250).

In the third place, the intention must be strictly proved. Parol evidence, even when it is the evidence of the settlor only (*Bonhote v. Henderson*, [1895] 1 Ch. 742), or of one of the parties after the death of the other parties (*Wollaston v. Tribe* (1869), L. R. 9 Eq. 44), may be held sufficient ; but the court is inclined to regard such evidence, unsupported by documents, with suspicion (*Tucker v. Bennett*, *supra*, and *Bonhote v. Henderson*, *supra*).

#### PARAGRAPH (2).

The case of *Johnson v. Bragge*, [1901] 1 Ch. 28, is a good example of the admission of parol evidence. There A., being about to marry, wrote to B., his solicitor, for information as to his own present and future means. B.

replied mentioning, among other things, that A. had a life estate in £7,000, with a power to settle the same on his intended wife for life, and then on his children, and suggesting he should do this. B.'s letter was handed to C., another solicitor, to prepare marriage articles carrying out B.'s suggestions. C. prepared the articles, which failed, however, to execute the power of appointment so as to give A.'s intended wife a life interest. On A.'s death, the question arose whether A.'s widow took a life interest in the £7,000. It being held that the power was not executed, she applied to the court for rectification of the articles, so as to make the articles execute the power. It was objected that, the agreement to settle a life interest on A's wife being one in consideration of marriage and not being in writing signed by the party to be charged, the articles could not be rectified as required merely on parol evidence:—*Held*, that they could be so rectified.

Where, however, the instrument is merely executory and is within the Statute of Frauds, parol evidence cannot be given to show the real intention, though the fact that it does not express the real intention is a good ground for resisting an action for its specific performance (*May v. Platt*, [1900] 1 Ch. 616). And where an executory contract which does not express the real intentions of the parties is executed by a conveyance incorporating its inaccuracy, the conveyance cannot be rectified. Thus, in *Thompson v. Hickman*, [1907] 1 Ch. 550, a contract for the sale of land, the parcels in which, by a mutual mistake, were inaccurate, was completed by a conveyance which embodied the parcels as contained in the contract:—*Held*, that the court could not rectify the conveyance (*cf. Beale v. Kyte*, [1907] 1 Ch. 564).

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**SECTION V.—MISTAKE AND MISREPRESENTATION.**

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**ART. CIV.—*Mistake and Misrepresentation.***

(1) Where a person, party to an agreement to enter into a legal relationship with another, is induced to agree thereto by a misconception of the facts surrounding or the legal rights and obligations arising out of such relationship, such misconception must have arisen either through a *mistake* on his own part or through *false representations* made to him by others.

(2) Where such misconception arose through false representations, then, if those who made such representations honestly believed them to be true, the agreement is said to have been induced by *innocent misrepresentation*, but if they knew them to be false or made them recklessly, not caring whether they were true or false, the agreement is said to have been induced by *fraudulent misrepresentation*.

(3) Where such misconception is as to the surrounding facts it is said to be, according as

it arises, a *mistake* or *misrepresentation of fact*; where as to the legal rights and obligations a *mistake* or *misrepresentation of law*.

#### PARAGRAPH (2).

We are not concerned here with what amounts to a representation in law. That is dealt with in the note to Art. CVIII. What is important here is the distinction between innocent and fraudulent misrepresentation. This distinction was finally settled by the House of Lords in *Derry v. Peek* (1889), 14 App. Cas. 337. But perhaps the best exposition of the law on the subject is that in the judgment of BOWEN, L.J., in *Le Lierre v. Gould*, [1893] 1 Q. B. 491.

In an action for fraudulent misrepresentation, as his lordship points out in that case (at p. 500), the direction given to the jury was this: "The jury were told that before they found a verdict against a man who was charged with fraudulent misrepresentation, they must be satisfied either that he had stated what was untrue, knowing that it was untrue, and intending that the untruth should be acted upon, in which case—a wilful lie being a wicked thing—he was necessarily dishonest, or, at any rate, they must be satisfied that, if he did not know that the statement was untrue, he made it deliberately intending that it should be acted upon, and not knowing and not caring whether it was true or false. If a man makes a wilful statement, intending it to be acted upon, and he is reckless whether it is true or false, he has a wicked mind; but his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case, it is the knowledge of the falsehood, in the second, it is the wicked indifference, which constitutes the fraud."

This case and *Derry v. Peek, supra*, put an end to the doctrine of constructive fraud—that is, the doctrine by which a person was held liable to an action for fraud, although it was admitted that he was not fraudulent, but merely grossly negligent. Negligence, if gross, may be

evidence of fraud, but never in itself constitutes fraud. There can be no fraud without dishonesty.

Even if the false representation is false to the knowledge of the person making it, it is not fraudulent if it is not made with the intention of inducing a person to enter into a certain legal relationship. This is shown by the case of *Tuckey v. McBain*, [1912] A. C. 186. There the director of a company was pressed by numerous dealers in its stock to disclose to them the nature of the report of an expert who had been sent to investigate the condition of the company's undertaking. The expert's report had been received and the director knew this; but to stop further inquiries he told the dealers that no report had yet reached the company. The dealers inferred from this that the report was delayed because it was unfavourable and sold in consequence the stock of the company, which fell heavily in value. Subsequently the report was published and proved very favourable. The dealers sued the director for fraud. The jury found that the director made the statement knowing it to be false and that the plaintiffs acted on the statement and were damaged. They found, further, that the defendant did not make it to induce them to act:—*Held*, that there was no fraud.

A fraudulent misrepresentation is none the less fraudulent because it is accompanied by a statement that the party to whom it is made must not rely upon it, but should verify the representation for himself. Thus, in *Pearson v. Dublin Corporation*, [1907] A. C. 351, the engineer of the corporation put statements in a specification for work which, it was alleged, he knew to be false. But the specification was accompanied by an announcement that intending contractors must verify for themselves all statements of fact:—*Held*, that if the engineer knew that his statements were false and dishonest, they were fraudulent notwithstanding such announcement.

#### PARAGRAPH (3).

It is not always easy to say whether a mistake or misrepresentation is one of law or one of fact. The rule followed by the courts seems to be this: If a person know

or have represented to him the surrounding circumstances accurately, and knowing these, he mistakes, or has misrepresented to him, the legal rights resulting therefrom, this is a mistake or misrepresentation of law. On the other hand, if, without stating the facts, the other party misstates to him the joint effect of the surrounding circumstances and the law applicable, this is a misrepresentation of fact. As JESSEL, M.R., puts it in *Eaglesfield v. Marquis of Londonderry* (1875), 4 Ch. D. 693, at p. 702 : "A misrepresentation of law is this : when you state the facts and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law ; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, ' You may ; she is a single woman of large fortune.' It turns out that the man who gave the answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void. . . . He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told the whole story and all the facts, and said, ' Now, you see, the lady is single,' that would have been a misrepresentation of law."

A good example of a misrepresentation partly of law and partly of fact is the case of *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149. In that case, by the misreading of a private Act of Parliament, A. believed and represented to his nephew that he (A.) was entitled absolutely to a fishery. On A.'s death his nephew, believing what A. had represented, took a lease of such fishery. Afterwards, on reading the private Act, he saw that the property was his own :—*Held*, that he was entitled to have the lease rescinded.

It is to be remembered that any question of foreign law is a question of fact ; and accordingly all mistakes and misrepresentations of foreign law are not mistakes or misrepresentations of law, but of fact (*Leslie v. Baillie*

(1843), 2 Y. & C. (N.R.) 91). What is law outside England is in an English court always a question of fact upon which expert evidence may be given.

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#### ART. CV.—*Mistakes and Misrepresentations of Law.*

Where a person is induced to agree to enter into a legal relationship with another by a mistake or misrepresentation of law, such person is bound by his agreement unless the other party to it—

- (i) knew of the mistake or misrepresentation and took advantage of it; or
- (ii) was an officer of the court who in that capacity received property under the agreement; or
- (iii) was in a fiduciary position towards the person agreeing.

The principle underlying this rule is *Ignorantia juris haud excusat*—a maxim in which (as pointed out by Lord WESTBURY in *Cooper v. Phibbs, supra*) “the word *jus* is used in the sense of denoting general law, the ordinary law of the country. When the word *jus* is used in the sense of denoting a private right, that maxim has no application.” As already pointed out, most representations as to private rights are really representations as to mixed questions of law and fact, and as such are always treated as representations of fact.

In the case of *Eaglesfield v. Marquis of Londonderry* (*supra*, p. 263) a company had issued £85,000 “No. 1 preference stock,” which had precedence over “No. 2 preference stock” and the ordinary shares. Under certain Acts of Parliament the company had power to issue

£15,000 further preference stock, which, by a mistake in interpreting the Acts, the company thought would rank with the No. 1 preference stock. This stock they issued, describing it as No. 1 preference stock in the certificate. Subsequently the court decided that the new stock ranked after both No. 1 and No. 2 preference stock.

The plaintiff, being aware of the Acts of Parliament at the time, bought some of the £15,000 stock knowing it was not part of the £85,000 No. 1 preference stock, but new stock which he believed would rank with that. Afterwards he sued for rescission of contract. JESSEL, M.R., held that the misdescription of the stock in the certificate was a misrepresentation of fact. The Court of Appeal reversed this decision, holding that as the plaintiff never thought the stock was part of the £85,000 No. 1 preference stock, but merely new stock issued under an Act of Parliament which he and the company both thought made it rank with that stock, there was only an innocent misrepresentation of law, and the plaintiff was therefore not entitled to rescission.

(i) A wilful misrepresentation of law is a misrepresentation of fact, since it misrepresents the state of the representor's mind, which is a physical fact.

(ii) The rule as to payments made by mistake of law to officers of the court is stated thus by KEKEWICH, J., in *Re Opera, Limited*, [1891] 2 Ch. 154; 3 Ch. 260: "If the assets in the hands of an officer of the court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the court will compel its officer to recognise the rules of honesty as between man and man and to act accordingly."

This rule, which Lord ESHER in *Ex parte Simmonds* (1885), 16 Q. B. D. 308, pronounced a good, a righteous, and a wholesome principle, was first applied to a trustee in bankruptcy (*Ex parte James* (1874), L. R. 9 Ch. 609); but now it has been extended to all officers of the court receiving payments by mistake of law in that character (*Ex parte Simmonds, supra*). If the officer has, before

the mistake is discovered, distributed the funds, he must make compensation out of any future moneys coming into his hands in the same manner (*ibid.*).

(iii) This is mentioned here merely for completeness. The rules regulating dealings between persons in a fiduciary relation are discussed elsewhere (*supra*, Art. LXIII. ; and *infra*, Art. CXV.).

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#### ART. CVI.—*Fundamental and Incidental Mistakes of Fact.*

(1) Where a person is induced to agree in form to enter into a legal relationship with another person by an entire mistake of fact as to—

- (i) the subject-matter of the transaction ; or
- (ii) the legal relationship intended ; or
- (iii) the identity of the other party to the agreement ;

then the parties are never *ad idem*, and there is no agreement in law or in fact between them. Such a mistake is said to be a *fundamental* mistake of fact.

(2) Though there is no agreement in law or in fact between the parties to such a transaction, yet a party may be estopped from pleading this if the other party did not know of his mistake, and if—

- (i) such other party has in consequence of the transaction changed his position ; or

- (ii) the transaction relates to money paid by mistake, and such money has been paid under pressure of legal process initiated by the payee ; or
- (iii) the transaction relates to the sale of land, and it has been completed by conveyance.

(3) A mistake of fact not coming within paragraph (1) is called an *incidental* mistake.

Where a person is induced to agree to enter into a legal relationship with another person by an incidental mistake of fact, he is bound by his agreement ; but where the agreement is to sell or purchase land, or any agreement of which in ordinary circumstances specific performance would be decreed, then on an action for specific performance against the party damaged by the mistake, the court will not grant a decree in cases where such decree would inflict great hardship upon the party in question.

#### PARAGRAPH (1).

The decisions as to mistakes are not very clear, nor very easy to reconcile. The broad rule, however, which seems to be deducible from them is that a mistake of fact does not affect in law an agreement unless the mistake is fundamental, and then it prevents there being in law any agreement at all. This rule, of course, is subject to many limitations and refinements, some of which will be referred to here.

First, as to examples of fundamental mistakes. If Blackacre and Whiteacre are being sold at the same auction, and A., intending to buy Blackacre, by mistake bids for and has knocked down to him Whiteacre, this is a fundamental mistake as to the subject-matter of the transaction, and there is no agreement. A. and the

auctioneer were at cross purposes, and therefore there could not be any agreement between them (*Van Praagh v. Everidge*, [1903] 1 Ch. 434).

Again, if A., intending to mortgage Blackacre for £1,000, agrees with B. by mistake to sell it for that sum, here there is a fundamental mistake as to the legal relationship intended. A. intended to mortgage only, B. intended to buy, and therefore there could be no agreement between them.

In the third place, A., a notorious money-lender, enters under an assumed name into a contract of loan with B. If B. had known who A. was he would never have contracted with him. Here there was no agreement on B.'s part to contract with A. (*Gordon v. Street*, [1899] 2 Q. B. 641).

An example of the rule which is usually treated as not coming within it is the case of money paid by mistake or on total failure of consideration. It is, however, really in its essence but an application of the rule. This is shown by the consideration that to make such money recoverable the mistake under which it is paid must be fundamental. In the words of BRAMWELL, B., in *Aiken v. Short* (1856), 1 H. & N. 210, at p. 215, the mistake must be "as to a fact which, if true, would make the person paying liable to pay the money ; not where, if true, it would merely make it desirable that he should pay the money." In other words, the mistake must go to the whole basis of the transaction—the payor's liability, in fact, to pay.

A good example of money paid by mistake or recoverable on total failure of consideration is *Re the Bodega Company, Limited*, [1904] 1 Ch. 276. The defendant was a director of the B. company. By the articles it was provided that a director who became interested in any contract with the company should *ipso facto* cease immediately to be a director. The defendant, unknown to the other directors, became so interested. He continued to act as director and to receive director's fees for his services. When it was discovered that he was interested in the contract an action was brought to recover back the

fees paid to him, on the grounds—(1) that they were paid under a total mistake of fact as to his not being a director, and (2) that there was a total failure of consideration, since though he had done the work of a director, he had never been asked to do so, and therefore on the ordinary law of contract he had rendered no services for which remuneration was due :—*Held*, that the company was entitled to recover on both grounds. “Consideration,” as used in the phrase “total failure of consideration,” does not mean that no consideration in fact was given, but that there was no consideration sufficient to support an action to recover the remuneration (*per* FARWELL, J., at p. 287 ; for further examples of cases of total failure of consideration, see *infra*, p. 271).

It has been decided that mere negligence on the payor’s part will not prevent his recovering money really paid by mistake (*Durrant v. Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234). It is submitted that the same rule applies to all transactions originating in fundamental mistakes (see *Van Praagh v. Everidge*, [1903] 1 Ch. 434), and that such transactions become binding only on the grounds stated in paragraph (2) of the above Article.

The rule applies equally to credit given by mistake. Thus, in *Ward and Company v. Wallis*, [1900] 1 Q. B. 675, the plaintiffs, in bringing an action against the defendant, credited him by mistake with having paid £75 on account, and sued only for the balance. Discovering after judgment their error, the plaintiffs began a second action for the £75 credited by mistake :—*Held*, that they were entitled to recover. “It is well settled,” said KENNEDY, J. (*ibid.*, at p. 679), “that an allowance in account is equivalent to a payment.”

#### PARAGRAPH (2).

By estoppel is meant that the court will not allow a party to rely on certain matters, even though those matters, if established, would entitle him to the court’s decision. Estoppel by representation, though probably originally an equitable doctrine (see Ash. Eq., p. 628),

has since *Pickard v. Sears* (1837), 6 A. & E. 475, been treated as belonging to common law.

No person can claim the benefit of estoppel unless he acted bona fide in the transaction. If A. makes by mistake an offer to sell Blackacre for £1,000, when he meant merely that he would let it at that rent, and B. accepts the offer, knowing of the mistake, B. cannot be heard to say that he took advantage of what he knew to be a blunder (see *Porter v. Moore*, [1904] 2 Ch. 367). In the same way, if A. sues B. for £100 knowing that only £50 are owing, and B. pays by mistake £100, A. will not be heard to say that though he knew only £50 to be due, still, since B. paid under pressure of process of law, he is entitled to keep the £100. Thus, in *Ward and Company v. Wallis (supra)* the defendant was aware that the amount for which the plaintiffs had given him credit was not in fact paid :—*Held*, that the plaintiffs could still recover it, though the credit was given in a previous action.

(i) A common instance of this arises where money is paid by mistake to an agent who, before the mistake is discovered, has accounted to his principal for it. In such a case, if the agent received it innocently, no action lies against him (see *Kleinwort v. Dunlop Rubber Company* (1907), 97 L. T. 263).

(ii) By payment under pressure of legal process is meant here not merely recovery under judgment of a Court of Law, but payment after the commencement of legal proceedings. Thus, in *Moore v. Vestry of Fulham*, [1895] 1 Q. B. 399, after summons issued to recover the money alleged to be owing, the defendant had paid :—*Held*, that the money was paid under pressure of legal process.

Apparently this principle does not apply to payments under a consent order in an action, agreed to under a mistake of fact (see *Marshall v. James*, [1905] 1 Ch. 432). Thus, in *Huddersfield Banking Company v. H. Lister and Son, Limited*, [1895] 2 Ch. 273, the debenture-holders of a certain company agreed to an order for the sale by the receiver of the company of certain machinery, on the

mistaken assumption that such machinery was not annexed to the freehold and therefore not included in their mortgage. After the sale was completed it was discovered that the machinery was in fact so annexed. The debenture-holders then applied to the court to set aside the order:—*Held*, that as it was based upon a mistake, the order must be set aside, and that the price of the machinery was money had and received by the receiver on their behalf. LINDLEY, L.J., in the Court of Appeal, held that wherever the agreement could be set aside if there were no consent order, it could be set aside notwithstanding a consent order. *Quare*, if there had been no consent order in this case, but the parties had merely agreed after action brought that the property belonged to the company, whether that agreement could have been set aside?

(iii) This exception to the rule—if it is an exception—is very limited in its operation. It applies only to the case of a vendor of land bona fide selling it when his title to it is bad. Here it may be said that there is a total failure of consideration just as if he had sold an annuity which had lapsed, in the bona fide belief that it still existed (*Ship's Case* (1865), 2 De G. J. & S. 544), or a life assurance where the assured was dead, in the bona fide belief that the insured was still living (*Scott v. Coulson*, [1903] 2 Ch. 249). In both of these cases the court would grant rescission of contract after assignment just as before—in the first case, on the application of the vendee, and, in the second, on the application of the vendor. But in the case of the sale of land by a vendor having had a bad title the court would not grant rescission even though the next day after the conveyance the purchaser was evicted by the person to whom the land really belonged (*Soper v. Arnold* (1887), 37 Ch. D. 96). This seems settled law, at any rate where the vendor had a possessory title. But it cannot be said that a vendor who has a possessory title has no interest in the land, and if he has an interest it cannot be said that there has been a total failure of consideration. Where there is a total failure of consideration there seems no doubt that the sale can be set aside even after conveyance (see *Debenham v. Sawbridge*, [1901] 2 Ch. 98). Thus, where land actually belonging to the purchaser is sold to him, the court will set

the sale aside for total failure of consideration (*Bingham v. Bingham* (1748), 1 Ves. sen. 126). And this is the case equally when the sale was induced by innocent misrepresentation (*Cooper v. Phibbs* (1867), L. R. 2 H. L. 149).

### PARAGRAPH (3).

A good example of an incidental mistake as to the subject-matter of an agreement is seen in *Tamplin v. James* (1878), 15 Ch. D. 215. There a property called "the Ship" was offered for sale by auction. In the particulars of sale it was accurately described, and there were displayed on the walls of the auction-room plans giving accurately the frontages. It was, however, actually occupied in conjunction with two other premises not belonging to the vendors. The defendant, who knew the property, assumed, without looking at the particulars or plans, that the property to be sold was the property as occupied. He bought it, and on discovering his mistake refused to complete:—*Held*, that he was not entitled to rescission or a refusal of specific performance. Here the parties were *ad idem*. They both intended to deal with the property called "the Ship." But the defendant, through no fault of the plaintiffs, made a mistake as to the exact quantity of land included under that description.

As to the question what hardship will prevent the court granting a judgment for specific performance, see *infra*, Art. CLVIII.

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### ART. CVII.—*Negative and Positive Misrepresentations of Fact.*

Misrepresentation is of two kinds, negative and positive.

By *negative misrepresentation* is meant a failure to disclose facts where there is a legal duty to disclose them.

By *positive misrepresentation* is meant the actual representation by words or acts of facts as being different from what they are.

By negative misrepresentation is meant here not the *suppressio veri*, which has the effect of making the facts disclosed misleading. Thus, in *Delany v. Keogh*, [1905] 1 I. R. 267, an auctioneer in selling a leasehold property stated that the rent was £25 a year but the landlord accepted £18 (as was the fact). At the time he stated this he knew that the landlord intended to demand the full £25 from a new tenant. This was held to amount to an implied representation, and such implied representations are regarded for present purposes as positive misrepresentations. By negative misrepresentation is meant simply a failure to disclose relevant facts, innocently or otherwise, where the law puts a duty upon the party to disclose them.

Positive misrepresentation usually is made by means of words uttered or written. But it may be made by any act or mode, provided it has the effect of inducing the other party to believe the thing that is not. Thus, the offering for sale of sham antiques may of itself amount to a positive misrepresentation that they are genuine. Here the maxim *Res ipsa loquitur* applies (*Patterson v. Landsberg* (1905), 7 F. 675). But the representation must be more than mere puffing of one's goods and vague general statements (*Dimmock v. Hallett* (1866), L. R. 2 Ch. 21).

#### ART. CVIII.—*What amounts to Legal Misrepresentation.*

In order that it may constitute a cause of action a positive or negative misrepresentation of fact relevant to a transaction must fulfil the following conditions :

- (i) It must relate to an existing physical fact.

- (ii) It must relate to a material fact.
- (iii) It must constitute part of the grounds which were intended to induce the person to whom it was made to enter into the transaction.
- (iv) It must have contributed to induce such person to enter into such transaction.

(i) By saying that a misrepresentation in order to be actionable must be of an existing physical fact, what is meant is that mere expressions of beliefs, hopes, and opinions are not sufficient to ground an action for misrepresentation. The person making the misrepresentation must refer in it to a fact actually existing or which he says actually exists. But in this connection it is to be remembered that the state of the representer's mind is a physical fact. As said by BOWEN, L.J., in *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483, the state of a man's mind is as much a physical fact as the state of his digestion. Accordingly, if he misrepresents the actual state of his opinions on a particular point, then, if the misrepresentation fulfils the other conditions mentioned in the Article, the representer is liable for false representation.

Further, a mere expression of opinion may amount to an absolute misrepresentation of fact. Thus, a statement that a certain mine is practically ready for work as soon as machinery can be erected amounts to a representation that the mine is in an almost complete state of development (*Aaron's Reefs v. Twiss*, [1896] A. C. 273, at p. 283).

(ii) Whether a fact is or is not material is itself a question of fact, not of opinion. Accordingly, where a person either misstates a fact or fails to disclose it, being under an obligation to disclose it (see *infra*, Art. CIX.), he is guilty of misrepresentation, even though he was honestly of opinion that the fact was *not* material (*Gordon v. Gordon* (1816), 3 Swanst. 400). Again, any fact which is made the basis of a contract is—whether it would be so con-

sidered or not independent of the contract's terms—a material fact (*Gordon v. Street*, [1899] 2 Q. B. 641).

It is to be remembered that a representation as to the contents of a document not shown to the person to whom the representation is made is a representation as to a fact (*Wauton v. Coppard*, [1899] 1 Ch. 92). It is also to be noted that what is the law in foreign countries is always a question of fact. As to companies, while all that appears in the public documents of the company—such as the memorandum of association and the articles—is understood to be known to all persons dealing with the company, what has actually happened in meetings of the company or of the directors is not supposed to be known, and a misrepresentation as to proceedings at such meetings is one of which the court will take cognisance (*County of Gloucester Bank v. Rudry Merthyr Colliery Company*, [1895] 1 Ch. 629).

(iii) and (iv) A mere representation by a person having no intention of establishing a legal relation between himself or some one else and the man to whom he makes the representation is not actionable. If, however, the misrepresentation was made for the purpose of inducing the person to whom it was made to enter into a legal relationship, the fact that the latter person might have corrected the misrepresentation had he examined the facts does not in the slightest degree prevent his bringing an action for loss caused by the misrepresentation, if, in fact, he relied upon it (*Redgrave v. Hurd* (1881), 20 Ch. D. 1). Further, where a misrepresentation has been made, and the person to whom it was made enters into a legal relation, it will be assumed till the contrary is shown that the latter entered into the legal relationship in consequence of the misrepresentation (see *Attwood v. Small* (1838), 6 Cl. & F. 232; cf. *Nash v. Calthorpe*, [1905] 2 Ch. 237). Where, however, nobody was deceived by the misrepresentation, no action lies (*Salomon v. Salomon and Company*, [1897] A. C. 22).

ART. CIX.—*Where Non-disclosure Constitutes Negative Misrepresentation.*

(1) A person entering into an agreement is not under a legal duty to disclose to the other party to such agreement facts within his knowledge relevant to the agreement, even though he knows that the other person is labouring under a mistake as to these facts, and that such mistake is influencing him in entering into the agreement, provided he has not directly or indirectly induced such mistake.

(2) Exceptions to this rule occur in the case of—

- (i) Compromises of disputed claims.
- (ii) Family arrangements.
- (iii) Contracts *uberrimæ fidei*.
- (iv) All agreements between two persons, one of whom stands in a fiduciary relation to the other, in so far as such agreements are within their fiduciary relationship.

PARAGRAPH (1).

The general principle is thus stated by FRY, L.J., in his work on “Specific Performance” (par. 705): “Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance.” This statement of the law was adopted and approved by CHITTY, J., in *Turner v. Green*, [1895] 2 Ch. 205, at p. 208.

The case of *Turner v. Green (supra)* is a good (if somewhat extreme) example of the application of this principle. Here negotiations for the settlement of an action were going on. Before the final arrangement was arrived at the solicitor of one of the parties (A.) learned by a telegram from his London agent that the Master had decided against him, and he had appealed to the judge. The other party (B.) was unaware of this, and neither A. nor his solicitor communicated it to him. In ignorance of it B. agreed to the settlement :—*Held*, that the settlement was good, as A. was under no obligation to inform B. of the Master's decision (*sed quære*).

If, however, one of the parties has directly or indirectly induced the mistake, he is bound on discovering the mistake to correct it before the contract is carried out. Thus, if a representation is made which was true, or believed to be true, at the time it was made, but is afterwards rendered false by a change in the subject-matter of the transaction or in the circumstances surrounding it, information of this change must be given to the party to whom the representation was made. Thus, in *Davies v. London and Provincial Marine Insurance Company* (1878), 8 Ch. D. 469, the defendants had had an agent of theirs arrested on a charge of felony. The agent's friends, to save him from prosecution on the charge, provided money as security for the repayment of the funds of the defendants which the agent was charged with stealing. Before the security was completed the defendants were informed by their legal advisers that the facts were not sufficient to sustain a charge of felony against the agent. This information was not communicated to his friends until the security was completed :—*Held*, that the agreement for security must be rescinded, and the money deposited returned to the agent's friends. Here, the defendants at the time they accepted the security knew that the charge which had been made by them against the agent was mistaken, and that his friends were bargaining on the understanding that the defendants were resolved to proceed on it. And note incidentally that the fact that the agreement was illegal as a compromise of a charge of felony, did not affect the right of the friends to have it rescinded (*cf. Scott v. Coulson*, [1903] 2 Ch. 249; see

also *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351).

*Porter v. Moore* ([1904] 2 Ch. 367) is an instance of a mistake being indirectly induced. There the solicitors for an intending mortgagee of a trust fund induced the trustee to sign a memorandum to the effect that he had received no notice of any charge affecting the trust property. The solicitors did not before doing so inform him that they had submitted this memorandum to the trustee's solicitors, who were considering it. After the trustee had signed, his solicitors informed the mortgagee's solicitors that it was their practice to advise clients not to sign a memorandum such as that submitted :—*Held*, that the trustee was not bound by the memorandum. (And see *In re Puckett and Smith's Contract*, [1902] 2 Ch. 258.)

#### PARAGRAPH (2).

(i) The compromise of the action would not have been binding, says JAMES, L.J., in *Maynard v. Easton* (1874), L. R. 9 Ch. 414, at p. 422, “if there had been any concealment of truth, or suggestion of what is false, but that must be understood as relating to what is relevant to the matter to be compromised.”

In that case a father bought certain shares in the name of his son, who was an infant. Subsequently, on the company going into liquidation, the son sued the vendor by his father as next friend for false representation. The vendor compromised the action. Subsequently the vendor, on the liquidator discovering the son was an infant, was placed on the list of contributors. He then tried to have the compromise set aside, on the ground that when it was entered into the fact was concealed from him that the father, and not the son, was the real owner of the shares :—*Held*, that this fact was immaterial, and the compromise was binding. The vendor had compromised the action because he feared if it was heard the decision would be against him. That did not depend in any way upon whether the father or son was the true purchaser of the shares.

(ii) The law as to family arrangements is well and concisely stated in the judgment in *Westby v. Westby* (1842), 2 Dr. & War. 503 : "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour, of the family, those arrangements have been sustained by this court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers."

Though, however, the court is more reluctant to set aside a family arrangement than a compromise between strangers, still the principle on which it proceeds in both cases is identical. This is stated by TURNER, L.J., in *Brooke v. Lord Mostyn* (1864), 2 De G. J. & S. 373, at p. 416 : "If there be no fraud and equal knowledge on both sides, the compromise cannot be disturbed." The fraud may be on the part of a third person. Thus, in *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704, the parties' family solicitor, honestly believing that a compromise proposed by him was for the benefit of them all, deliberately or by a misconception misrepresented the respective rights of the parties :—*Held*, that the compromise could not be supported.

(iii) It is usual in speaking of contracts *uberrimæ fidei* to confine the expression to contracts of insurance, guarantees, and partnership agreements (*Law v. Law*, [1905] 1 Ch. 140). This, however, though convenient, is inaccurate. Contracts are *uberrimæ fidei*, not because they are contracts of insurance, etc., but because they are contracts in which one party has to rely on the knowledge of the other party as to the risk he takes in entering into the transaction. Thus, not merely are the contracts above mentioned contracts *uberrimæ fidei*, in most cases, but so also are contracts between trustee and cestui que trust (*supra*, p. 154), between client and solicitor, guardian and ward (*per ROMER, L.J.*, in *Seaton v. Heath*, [1899] 1 Q. B. 782, at p. 792). These latter, however, it will be convenient to consider separately.

Thus, a contract of insurance—whether life, fire, or marine—must in the nature of things be in nearly every case a contract *uberrimae fidei*, because the insuror must take the insured's word for most of the facts on which he calculates the risks he undertakes (see *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365). But a guaranteee is usually not a contract *uberrimae fidei* at all. In guarantees the other party to the guaranty has in most cases no negotiations with the guarantor. The negotiations are with the person whose liability is being assured, and, in the absence of fraud, under such circumstances the party to whom the guaranteee is given is entitled to assume that the guarantor satisfied himself as to the transaction before becoming surety (*ibid.*). Where, however, the person becoming surety does so at the request of the person to whom the guaranteee is given, the latter is bound to disclose all material facts within his knowledge.

It is often said that contracts for the sale of land are *uberrimae fidei*. This is a mistake. It is true the vendor of land has to produce an abstract of his title to the land, and such abstract, so far as it extends, must set out his title accurately. But he is not bound to disclose defects of title not coming within such abstract, nor need he disclose matters of fact which affect the value of the land. The court, however, has a discretion to refuse specific performance of such a contract where facts have been withheld which make it a great hardship upon the purchaser to insist on his carrying out his contract to buy. As to the effect of conveyance, see *infra*, p. 281.

(iv) It has been said that contracts between trustee and cestui que trust, solicitor and client, guardian and ward, etc., are, strictly speaking, contracts *uberrimae fidei*. The first of these, however, have already been dealt with, and it will be better to treat of the others in connection with the question of undue influence (*infra*, Art. CXV.).

It is to be remembered that a party entitled to the rescission of a contract on the ground of negative misrepresentation, may waive, expressly or impliedly, his right to rescind or may be estopped from asserting it by *laches* on his part (see *infra*, p. 384). And estoppel may

arise even where the party was not fully aware of the extent of the negative misrepresentation. Thus, on the dissolution of a partnership one partner did not reveal to the other all the assets of the firm. In consequence the other partner sold his share in them for less than its value. Afterwards he learnt of some of these undisclosed assets but not others. Nevertheless he accepted payment subsequently of the original price. Subsequently he learnt of the other undisclosed assets:—*Held*, he was estopped by *laches* from impugning the contract (*Law v. Law*, [1905] 1 Ch. 140; and see *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365).

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#### ART. CX.—*Effect of Innocent Misrepresentation.*

An innocent misrepresentation coming within Art. CVIII. will, when made by the other party to the transaction, sustain an action for rescission of the agreement induced by it.

Where, however, the agreement has been executed by conveyance or assignment of the subject-matter of the agreement, such misrepresentation will not sustain an action for rescission of the conveyance or assignment.

See *Redgrave v. Hurd* (1881), 20 Ch. D. 1; *Re Glubbe*, [1900] 1 Ch. 354; and *Wilde v. Gibson* (1848), 1 H. L. Cas. 605.

Thus, in *Seddon v. North Eastern Salt Company, Limited*, [1905] 1 Ch. 326, the plaintiff bought certain shares in a company from the defendants. During the negotiations for sale the defendants made certain innocent misrepresentations as to the business of the company. After sale these were discovered:—*Held*, that, though if the misrepresentations had been discovered before the

transfer of the shares the plaintiff might have rescinded, he was not entitled to rescind after such transfer.

For the purpose of rescission, an executed lease is a conveyance within this Article (*Angel v. Jay*, [1911] 1 K. B. 666).

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#### ART. CXI.—*Effect of Fraudulent Misrepresentation.*

(1) A fraudulent misrepresentation coming within Art. CVIII. will, when made by the other party to the transaction, sustain an action for rescission of the contract induced by it, or, if the contract is one of sale, of the conveyance completing such contract; and will, in any case, sustain an action for damages for deceit against the party making the fraudulent misrepresentation.

(2) A conveyance completing a contract of sale induced by fraudulent misrepresentation is, however, not void, but only voidable. Accordingly, if, after the conveyance and before action brought, the property conveyed is sold and transferred at law to a purchaser for value without notice of the fraud, no action for rescission lies against such third person.

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#### ART. CXII.—*Responsibility for Misrepresentations of an Agent.*

(1) Misrepresentations within Art. CVIII., and whether innocent or fraudulent, will, when

made by an agent, give the person to whom they are made the same remedy against the principal as if they had been made by the principal, where :

- (i) the agent was specially authorised by the principal to make the misrepresentations ; or
- (ii) the agent was generally authorised by his employment to make representations in that connection on behalf of his principal ; or
- (iii) the agent's representations, though not made with the special or general authority of the principal, are adopted by him.

(2) Misrepresentations by an agent unauthorised in any way to make them will render the principal liable to account to the person to whom they are made for any profit the principal may have gained through them.

(3) Misrepresentations by a stranger will have the same result as regards a party who, when entering into a contract, is aware that the other party is being induced to enter into it by the representations of the stranger, and, where such representations are fraudulent, is also aware that they are in fact false.

#### PARAGRAPH (1).

*Cf. Karberg's Case, [1892] 3 Ch. 1; and Lord Lurgan's Case, [1902] 1 Ch. 707.*

Where the agent is acting within the scope of the authority expressly given him by the principal, the principal is liable for his fraud, even when the fraud was committed, not for the principal's, but for the agent's benefit (*Lloyd v. Grace, Smith and Company*, [1912] A. C. 716; cf. *George Whitechurch v. Caranagh*, [1902] A. C. 117; *Hambro v. Burnand*, [1904] 2 K. B. 10; *Pearson v. Dublin Corporation*, [1907] A. C. 351; and *supra*, p. 262).

#### PARAGRAPH (2).

Thus, an agent of an insurance company, with the object of inducing a lady who was insured with the company to continue her insurance, falsely represented to her that after she had paid the annual premium for four years more she would receive a policy free from future premiums. The agent had no authority, express or implied, to make this representation, which was inconsistent with statements appearing on the face of the original policy. The lady in consequence of this misrepresentation paid the annual premiums for the four years. The company then refused to grant her a free policy:—*Held*, that it must return to her the premiums for the four years (*Kettlewell v. Refuge Assurance Company*, [1907] 2 K. B. 241).

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## SECTION VI.—FRAUD AND UNDUE INFLUENCE.

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### ART. CXIII.—*Legal Fraud.*

Besides agreements induced by fraudulent misrepresentations, every agreement is at common law voidable as against one party to it where it can be shown that the other party has in connection with such agreement been guilty of a dishonest act going to the basis of the understanding between the parties. This, like fraudulent misrepresentation, is called actual fraud.

As was pointed out in *Derry v. Peek* (1889), 14 App. Cas. 337, actual fraud is essentially a common law tort, and as such its discussion in detail is out of place in a treatise on equity. Having, however, in dealing with misrepresentation, to discuss the most important kind of actual fraud—that due to fraudulent misrepresentation—it is proper to add the above rule lest it may be thought that no fraud renders an agreement voidable except a fraud which actually induces the agreement.

The rule completes the subject of fraud as between parties to an agreement. It is based on the case of *Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha and Telegraph Works Company* (1875), 10 Ch. D. 515. There the defendants agreed with the plaintiffs to lay a telegraph cable at a certain price which was to be payable in twelve instalments as the work

progressed, on the certificate of the plaintiffs' engineer, who was named in the contract. After the contract was entered into the defendants agreed with the engineer that he should lay the cable at a price payable by instalments on the defendants receiving payment from the plaintiffs : —*Held*, that the plaintiffs were entitled to rescind.

The defendants had not induced the contract by fraud, but subsequently to entering into it they had been guilty of an act which made it impossible for the plaintiffs to secure its honest performance. This was the sole ground assigned by JAMES, L.J., and one of those assigned by MELLISH, L.J., for the decision. As said by WILDE, B., in *Udell v. Atherton* (1861), 7 H. & N. 172, at p. 181, “Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches” (*cf.* *Arehbold v. Lord Howth* (1865), Ir. R. 1 C. L. 608).

Though logically the matter is part of the law of property, yet, as it is usually referred to in works on equity, it is desirable to state very shortly the statutory law as to fraudulent dispositions of property (see *supra*, p. 79).

(1) Under 13 Eliz. c. 5, where a person makes a voluntary disposition of his *lands or of his goods capable of being taken in execution*, and where such disposition is calculated to, and does in fact, delay or defeat his creditors at the time of the disposition, or subsequent creditors who are entitled to stand in their shoes, the disposition will be deemed fraudulent as against such creditors. It will be voidable so far as is necessary to provide funds for the payment of such creditor's debts (see *Re Holland*, *Gregg v. Holland*, [1902] 2 Ch. 360 ; Stra. L. C., p. 68 ; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769 ; *Ideal Bedding Company v. Holland*, [1907] 2 Ch. 157).

(2) Under 27 Eliz. c. 4, any conveyance of *land* made for the purpose of defrauding subsequent purchasers for value of such land is void as against such subsequent purchasers.

Formerly any conveyance not made for value was presumed to come within this enactment if the grantor

subsequently conveyed the land for value. This rule has now been altered by the Voluntary Conveyances Act, 1893 ; and the 27 Eliz. c. 4, consequently only applies where the first conveyance was not merely voluntary, but actually fraudulent.

(3) By sect. 47 of the Bankruptcy Act a voluntary disposition of *any property* is void against the grantor's trustee in bankruptcy—

- (a) if made within two years preceding the bankruptcy ;
- (b) if made within ten years preceding the bankruptcy, unless it can be shown that the grantor at the time he made the disposition was solvent without its aid, and that his estate in the property passed immediately to the grantee (see *Re Carter and Kenderdine*, [1897] 1 Ch. 776).

As to the effect of bankruptcy on a covenant to settle property where the consideration is marriage, see *supra*, p. 75.

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#### ART. CXIV.—*Equitable Fraud.*

(1) In equity an agreement not proved to be actually fraudulent may be presumed to be so unconscionable that it is tainted with fraud, and therefore voidable. This presumption will be rebutted by proving that in fact it is fair and reasonable.

This presumption will be made for the benefit of the weaker party where the parties to the agreement dealt with each other on very unequal terms, and especially for the benefit of the vendor or mortgagor where the agreement is for the sale or incumbrance of an

expectant interest to which the vendor or mortgagor is, or expects to become, entitled.

(2) In equity an agreement intended to be an imposition or deceit upon other persons not parties to the agreement is regarded as fraudulent, and therefore voidable.

(3) A bargain by the donee of a special power that he shall receive a benefit out of the property subject to the power as a reward for his exercising it in favour of an object of the power, is a fraud upon the power and makes the exercise of it in favour of such object void.

#### PARAGRAPH (1).

It is to be noted that undervalue in itself never is sufficient to constitute presumed fraud. It is a necessary element merely, which, taken in conjunction with other circumstances—and more particularly such circumstances as the ignorance, poverty, or weakness of mind of the other party—may be sufficient to induce the court to hold that till the contrary is shown it will presume that the agreement was brought about by fraud.

Thus, in *Fry v. Lane* (1888), 40 Ch. D. 312, persons who occupied the position of a laundryman and a plumber becoming entitled to shares in a certain property were taken by A. to his solicitor. A. entered into an agreement with them to purchase their shares at a gross undervalue, and his solicitor acted both for him and for them, giving a great advantage to A.:—*Held*, that the sale was voidable.

As regards what used to be called snatching bargains from expectant heirs the law was formerly more stringent. It now depends on the Sales of Reversions Act, 1867. That statute enacts (sect. 1) that “no purchase, made bona fide and without fraud or unfair dealing, of any rever-

sionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue." And by sect. 2 "purchase" includes every "kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired."

Apparently the effect of this Act is to put bargains with heirs on the same line as bargains with owners in possession, subject to this, that the law regards an heir as being in a weaker position for making bargains than an owner in possession. As Lord SELBORNE points out in *Earl of Aylesford v. Morris* (1873), L. R. 8 Ch. 484, at p. 490, the Act leaves undervalue still as an element to be taken into consideration in deciding whether there has been fraud. "These changes of the law have in no degree whatever altered—the *onus probandi* in those cases which, according to the language of Lord HARDWICKE (in *Chesterfield v. Janssen* (1750), 2 Ves. sen. 125, at p. 155), raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud does not here mean deceit or circumvention: it means an unconscientious use of the power arising out of the circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (*cf. Harrison v. Guest* (1860), 8 H. L. Cas. 481; and *Brenchley v. Higgins* (1900), 83 L. T. 751).

#### PARAGRAPH (2).

The most usual examples of this species of equitable fraud were formerly those agreements for what was called marriage brocage, and secret settlements by women about to marry in fraud of the future husband's marital rights. Thus, an agreement under which A. agreed that if B. would help him to secure C. in marriage he would give B. part of C.'s fortune, was a fraud upon C. (*Hermann v. Charlesworth*, [1905] 2 K. B. 123). If, on the other

hand, after C. and A. had agreed to marry, C. secretly conveyed her fortune to B. to hold in trust for her separate use, that would have been a fraud on A.'s marital rights (*Countess of Strathmore v. Bowes* (1789), 1 Ves. 22). See now Married Women's Property Act, 1882.

The ordinary case now of frauds on third parties is where a debtor, to induce a creditor to join in a composition or offer accepted by the other creditors, secretly agrees to give him better terms than those which the other creditors have mutually agreed to accept (*Levita's Claim*, [1894] 3 Ch. 365; and cf. *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769).

#### PARAGRAPH (3).

When a person having a power to appoint to a certain person or class enters into a corrupt bargain with such person or one of such class to exercise it, this bargain is a fraud upon the person or class or those entitled to take in default of appointment. But to be so the bargain must be corrupt, i.e., for the purpose of obtaining for the appointor a benefit out of the property appointed (see *Saunders v. Shafto*, [1905] 1 Ch. 126; *In re Cohen, Brookes v. Cohen*, [1911] 1 Ch. 37). And it is no fraud upon a power if the donee, being one of the objects of the power, exercises it by appointing the whole property to himself (*Taylor v. Allhusen*, [1905] 1 Ch. 529).

It should be remembered that some powers operate to convey legal estates (i.e., common law powers and powers under the Statute of Uses), while others only convey equitable interests. Where the estate conveyed is legal, a purchaser without notice of the fraud takes a good title; but this is not so where the appointee takes only an equitable interest in the property fraudulently appointed (*Cloutte v. Storey*, [1911] 1 Ch. 18; and see *supra*, p. 41).

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ART. CXV.—*Undue Influence.*

(1) Every agreement induced by the exercise of undue influence over a party to the agreement is in equity voidable as against such party.

(2) Where the relationship between the parties to an agreement is such as to make it likely that one party will be unduly influenced by the other party, then if by such agreement a gift is made to the latter or his wife or child, such agreement will be presumed to have been induced by the exercise of undue influence by the person supposed to possess such influence, until the contrary is shown.

(3) The contrary can only be shown by proving that :

- (i) the person supposed to possess such influence did not in fact possess it ; or
- (ii) the agreement was not in fact entered into on his advice but on the independent advice of a third person.

The three personal grounds on which the common law granted rescission of an otherwise lawful agreement were fraud, coercion, and incapacity. Equity invented a fourth. Without holding that there was actual fraud or coercion, or that the person agreeing was mentally incapable of doing so, it held that a person might enter into an agreement under a combination of circumstances so akin to all the three legal grounds as to make it inequitable to hold him bound by it. This is what is meant by the equitable doctrine of undue influence.

Equity went farther. Not merely did it hold that an agreement induced by undue influence was voidable, but

that where one was made between persons occupying certain relative positions it must be presumed to have been induced by undue influence till the contrary was shown. This is really only an application or development of the general principle, that where one person reposes, or, in the nature of things, has to repose, confidence as to any matter in another person, it lies on the latter to show that in his dealings with the other as to such matter he acted fairly and reasonably. Examples of that principle we have had in the rules as to purchases by trustees from their cestuis que trust (see Art. LXIII.), as to constructive trusts (see Arts. LXXXIV.—LXXXVI), and as to contracts *uberrima fidei*, pp. 279 *et seq.*

Where actual undue influence is proved it is for present purposes practically equivalent to fraud. It may be that the person influenced knew clearly what he was doing, and was not actually forced into doing it, and was in his right mind, but the person who influenced him must have acted upon him in such a manner as to reduce him to a state in which he was not fit to be trusted with his own interests. This sort of state usually arises under the influence of religious emotions stirred up by an overzealous or dishonest spiritual superior or adviser (see *Allcard v. Skinner* (1887), 36 Ch. D. 145). But, in the making of wills at any rate, there must be more than persuasion to constitute actual undue influence. The person subject to the influence must be unwilling to do the act and be coerced into doing it by the stronger will of, or by the terrors, spiritual or otherwise, held over him, by the other (*Baudains v. Richardson*, [1906] A. C. 169 ; and see *Low v. Guthrie*, [1909] A. C. 278).

Presumed undue influence arises chiefly in connection with gifts, but as regards sales the cases we have mentioned as to trustees, constructive trustees, etc., might often be based on undue influence as much as on any other ground (see *Wright v. Carter*, [1903] 1 Ch. 27). As to gifts, before it is presumed that they are made under undue influence, it is necessary to prove a relationship between the parties likely to give one of them great influence over the other ; and even where such relationship is proved, the inference from it may be rebutted by showing that in

fact no such influence resulted (*Willis v. Barron*, [1902] A. C. 271). Thus, the relation of parent and child is presumed to give the parent much influence over the child, but not the child over the parent (*In re Coomber, Coomber v. Coomber*, [1911] 1 Ch. 174). But this may be rebutted by showing that the child has been "emancipated"—that is, that he or she has outgrown the influence which a parent naturally has over a child, either through his or her having reached mature years, and having lived away from home, or having broken with the parent. Till this is shown, the court will presume that a gift made by the child to the parent was made under the parent's influence unless it is shown that it was made in pursuance of independent advice given by somebody else (see *Powell v. Powell*, [1900] 1 Ch. 243). The same inference arises where the relationship between the parties is one similar to that between parent and child, as, for example, between guardian and ward, person *in loco parentis* and adopted child, trustee and cestui que trust, etc. Further, mere business or professional relations may, as to matters coming within the scope of the relation, give rise to the presumption of influence where the relations are such as presuppose confidence between the parties. Thus, a doctor towards his patient, a clergyman towards his spiritual ward, a solicitor towards his client, a partner towards his other partners, may be presumed to exercise great influence as to matters on which the others are likely to consult him. As to all these terminable relations the strength of the presumption depends on the intimacy and the recentness of the relation.

The law was recently considered by the Court of Appeal in *Wright v. Carter*, [1903] 1 Ch. 27. There A. made a voluntary settlement of part of his property on his children X. and Y. and on his solicitor Z. There was no evidence that the settlement was made on Z. on Z.'s advice, and it purported to be made in reward for services rendered by Z. The settlement was drawn by another solicitor called in by Z.'s advice. A year later A., being in pecuniary difficulties, entered into an agreement with X., Y., and Z., whereby this settlement was revoked and in consideration of X., Y., and Z. covenanting to pay A. an annuity for his life, A. settled all his present and future property on X.,

Y., and Z. equally. This transaction was again carried through by a solicitor called in by Z.'s advice; but apparently the solicitor was not consulted as to the expediency of the transaction:—*Held*, that the second settlement was entirely bad and that the first settlement was good as regarded the interests taken by the children, but bad as regarded the interest taken by Z.

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#### ART. CXVI.—*Legal and Equitable Remedies.*

Every agreement voidable at law or in equity for fraud or undue influence may be rescinded either before or after it has been completed by conveyance or assignment of the property concerned. After conveyance or assignment, however, it cannot be rescinded against a bona fide purchaser for value who had no notice of the fraud or undue influence.

In equity the only remedy of the innocent party is rescission and accounts, but at common law an action for deceit also lies against the party proved to be guilty of actual fraud.

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## THIRD DIVISION OF EQUITABLE RIGHTS.

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### EQUITIES TO PREVENT OPPRESSION.

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### SECTION I.—RELIEF AGAINST FORFEITURES.

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#### ART. CXVII.—*Penalties and Liquidated Damages.*

(1) For the purpose of equitable relief for forfeiture means—

- (i) the transfer to one party to a contract of the other party's interest in specific property ;
- (ii) the payment of a sum of money to one party by the other party,

where such transfer or payment is by the terms of the contract to take place on the failure of

the other party to perform and observe some or all of the covenants and conditions contained in the contract.

(2) Where the forfeiture is the payment of a sum of money, then, if it is intended—

(i) to be a punishment for the failure, it is called a *penalty* ;

(ii) to be an assessment before failure of indefinite damages likely to result to the other party through such failure, it is called *liquidated damages*.

(3) Equity always relieves against a forfeiture, whether it be the payment of a sum of money or the transfer of specific property, where such forfeiture is in the nature of a penalty.

It never relieves against a forfeiture where it is in the nature of liquidated damages.

#### PARAGRAPH (1).

Equitable relief against forfeiture can only be given where the forfeiture arises out of contract. Many forfeitures arise out of tenure. For example, by custom a copyhold interest becomes forfeited to the lord in case the copyholder grants a lease of more than a year without the licence of the lord. Here the court cannot relieve (*Peachy v. Duke of Somerset* (1722), 1 Stra. 447). Again, a forfeiture imposed on a gift may be unenforceable because the condition to which it is attached is void as contrary to the policy of the law. Thus, a condition in general restraint of marriage is void ; but a condition in partial restraint—such as not to marry without guardians' consent—may be good, and, if good, any forfeiture result-

ing on breach cannot be relieved against (*Re Whiting's Settlement, Whiting v. De Rutzen*, [1905] 1 Ch. 96).

"The true ground of relief against penalties," as said by Lord Chancellor MACCLESFIELD in *Peachy v. Duke of Somerset (supra)*, "is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired." Though this principle has been expanded it still states the real foundation of equitable relief.

#### PARAGRAPH (2).

An example of equity regarding a money payment as a punishment for failure to perform a covenant arises in connection with covenants for payment of interest on mortgage debts. If interest at an increased rate is payable on failure to pay the interest reserved on the proper days, then the higher rate is regarded as being by way of penalty. If, on the other hand, a deduction is to be made from the interest reserved in case the interest is paid punctually, the higher rate reserved is not regarded as being by way of penalty.

Parties are quite at liberty when entering into a contract to agree what will be considered the damages resulting from breaches of covenants. This is a particularly useful practice where the damages likely to result are very indefinite and difficult to prove. Where this is done the court will enforce the agreement; but where the damages which can result are clearly ascertainable the court holds that anything more agreed to be given must be in the nature of a penalty, and will not enforce it.

The rules stated in the next Article are those followed by the court in deciding whether a forfeiture is or is not intended as a punishment. It sometimes happens that by these a forfeiture which is in fact intended as a punishment is held to be liquidated damages. Thus, in *Strickland v. Williams*, [1899] 1 Q. B. 382, A., being committed to prison for breach of an injunction not to trespass on B.'s land, in order to obtain his discharge entered into a bond with B. to pay B. £100 if he did

again trespass on B.'s land. Subsequently A. broke the covenant. Here, in fact, the £100 was intended to be a punishment of A. for breaking his word, but since it came within the rule stated in paragraph (2) of the next Article it was held to be liquidated damages.

### PARAGRAPH (3).

The relief which equity gives where it holds a forfeiture to be in the nature of a penalty is this: where the forfeiture is of specific property, upon the person liable paying the actual damage resulting from the breach of the covenant and all costs, it annuls the forfeiture. Where the forfeiture is of a sum of money, it holds that the covenantee is entitled to sue the person liable only for the actual damage resulting from the breach. These principles of relief have been in some cases modified by statute.

The court has not been so liberal in holding forfeitures of specific property as in holding forfeitures of sums of money to be penalties (see next Article). This arises, partly at any rate, from the fact that in the nature of things it is more difficult to apply the rules distinguishing penalties from liquidated damages to specific property of uncertain value than to sums of money.

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## ART. CXVIII.—*Rules for distinguishing Penalties and Liquidated Damages.*

(1) When the covenant or condition or one of the covenants or conditions to which a forfeiture is annexed, is for the payment of a sum of money to the covenantee, the forfeiture is in the nature of a penalty.

(2) When the forfeiture is annexed only to one covenant or condition, and that covenant

or condition is for the doing of something else than paying a sum of money to the covenantee, then the forfeiture is in the nature of liquidated damages.

(3) When a forfeiture is of a sum of money, and is payable on the breach of one or all of several covenants or conditions, and the damage resulting from the breach of these would vary substantially, then, *prima facie*, the forfeiture is in the nature of a penalty.

(4) The fact that the forfeiture is described in the contract as a penalty, or as liquidated damages, though a fact to be considered by the court in determining whether it is or is not a penalty, is not decisive of that question.

#### PARAGRAPH (1).

This rule may be said to be without exception or limitation. Whether the forfeiture arises under a mortgage, a lease, a bond, or a simple contract, the forfeiture, either of an interest in property or a larger sum of money than that secured by the condition or covenant, will be held to be in the nature of a penalty, and will be relieved against.

Thus, in a mortgage equity has for ages relieved against the forfeiture of the mortgaged estate, which by law takes place when the mortgagor fails to pay the mortgage debt on the day fixed for its payment (see *infra*, Art. CXX.).

Then in a lease equity in the same way has long relieved against the forfeiture of the lease for the failure of the lessee to pay the rent reserved on the proper day. Formerly, the jurisdiction of the court to give relief was indefinite. Now by sects. 210 and 212 of the Common Law Procedure Act, 1852, application for relief must be made

at the latest within six months after judgment in ejectment has been obtained. Further, the lessee must, on the application, tender all rent due and costs. On the other hand, no forfeiture for non-payment of rent is to arise except demand is expressly made for the rent on the last day on which it is payable. But the demand is not necessary where the lease expressly provides otherwise, or where half a year's rent is due and there is no sufficient distress on the premises.

Forfeitures of leases for breaches of conditions to pay rent were the only forfeitures of leases against which equity relieved. Now, however, by sect. 14 of the Conveyancing Act, 1881, relief can be given before judgment in ejectment (but not after : *Rogers v. Rice*, [1892] 2 Ch. 170) in the case of most other conditions. Sect. 14 has been extended by the Conveyancing Act, 1892 (see Stra. Property, pp. 91, 92).

The equitable rule as to relief on bonds was declared in 8 & 9 Will. 3, c. 11, and 4 & 5 Anne, c. 3. The chief object of these statutes seems to have been to transfer the jurisdiction of relief to the Common Law Courts. The latter Act applies only to money bonds—that is, bonds in which the payment of one sum of money is secured by a covenant to pay on default a larger sum. Here judgment is to be given for the smaller sum, with interest, and the bond discharged. 8 & 9 Will. 3, c. 11—which probably goes beyond the equitable rule (see *per* COLLINS, L.J., in *Strickland v. Williams*, [1899] 1 Q. B. 382, at p. 385)—applies to “covenants or agreements in any indenture, deed, or writing contained,” under which more than one breach might occur. Here the covenantee is to assign all breaches ; the damages for these are assessed and judgment is entered for the sum reserved by the bond, but execution is issued only for the amount of the damage, the judgment remaining to cover any subsequent breach. Since the Judicature Act, 1873, these Acts serve little purpose, except, perhaps, that of traps for the unwary (see *Strickland v. Williams, supra*).

Independently of these statutes, the rule applies to all indentures and contracts. And it applies equally when

the forfeiture is annexed to several conditions, some of which are for securing the doing of other things, if any of them are for securing the payment of a smaller sum of money (see *Re Newman* (1876), 4 Ch. D. 724, cited *infra*, p. 302).

### PARAGRAPH (2).

This rule also seems to be without exception or limitation, unless it be where the sum reserved is so exorbitant as to make it impossible to believe that it was intended to be liquidated damages : *per* Lord DAVEY in *Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A. C. 6, at p. 17.

In that case the appellants had contracted to build certain warships for the Spanish Government. There was a clause in the contracts fixing the dates for the delivery of each ship, and placing a "penalty" of £500 per week for each ship which was delivered later than such dates. There was considerable delay in the delivery of all the ships. The Spanish Government paid the contract price and then sued for the amount of such "penalties" as liquidated damages :—*Held*, that it was entitled to recover them in full.

### PARAGRAPH (3).

This rule has been much criticised by competent lawyers (see *per* JESSEL, M.R., in *Wallis v. Smith* (1882), 21 Ch. D. 243, at p. 262, and *per* RIGBY, L.J., in *Willson v. Love*, [1896] 1 Q. B. 626). But it has now been so frequently approved of that it must be held to be good law (see *ex. gr.*, *per* Lord DAVEY in *Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Custaneda*, *supra*).

It was laid down by Lord WATSON, in *Lord Elphinstone v. Monkland Iron and Coal Company* (1885), 11 App. Cas. 332, at p. 342 : When a single lump sum is made payable by way of compensation on the occurrences of

one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification.

A good example of the application of this principle is *Re Newman* (1876), 4 Ch. D. 724. There a builder contracted to erect a building by a certain time. There was to be a forfeiture of £10 per week for every week it remained uncompleted after that date. Then various other covenants and conditions were inserted, and, finally, there was to be a forfeiture of £1,000 as "liquidated damages" if the builder failed to perform all the covenants and conditions contained in the contract. There was a failure to complete :—*Held*, that the £1,000 was a penalty.

In *Wallis v. Smith, supra*, JESSEL, M.R., inclined to limit the effect of *Re Newman* to holding that the £1,000, being in one event made payable on failure to pay the £10 penalty, must be considered a penalty in all events within paragraph (1). In *Willson v. Love, supra*, however, it was not so limited. And now the rule seems to be generally accepted in its wider sense, as stated by Lord WATSON in *Lord Elphinstone v. Monkland Iron and Coal Company, supra*, p. 301.

In *Diestal v. Stevenson*, [1906] 2 K. B. 345, a forfeiture which clearly came within this principle was held by BIGHAM, J., to be liquidated damages apparently on the ground that that was the intention of the parties. It is submitted that the true test is whether the circumstances show that the parties really tried to make a pre-estimate of damages or merely meant to punish for the breach (*see Commissioner of Works (Cape of Good Hope) v. Hills*, [1906] A. C. 368). Where punishment was intended the court relieves notwithstanding the intention of the parties. In other words, it will not permit them to contract in that way (*cf. relief under mortgages, infra*, p. 310).

It is to be noted that this rule applies only when the forfeiture is of a sum of money, not of specific property. Where it is of specific property, the court will judge whether the forfeiture is a penalty or not in respect to each covenant to which it is annexed. Thus, it is the

custom in a lease to put in a general clause forfeiting the lease on the breach of any of the covenants contained in it, including the covenant to pay rent. The forfeiture here in regard to the payment of rent will be treated in equity as in the nature of a penalty and relief given (see Stra. Property, p. 90), but in regard to the other covenants and conditions as in the nature of liquidated damages.

#### PARAGRAPH (4).

In the words of Lord ESHER, M.R., in *Willson v. Lore* (*supra*), "A succession of judges have held that the use of the term 'penalty' or 'liquidated' damages is not conclusive; but no case, I think, declares that the term used by the parties themselves is to be altogether disregarded; and I should say that where the parties themselves call the sum made payable a 'penalty,' the onus lies on those who seek to show that it is to be payable as 'liquidated damages.'"

That the use of the term "penalty" or "liquidated damages" is not conclusive is sufficiently evident from the foregoing cases. Thus, in *Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Custaneda* (*supra*), where the forfeiture was held to be liquidated damages, it was described in the contract as a penalty, and in *Re Newman* (*supra*), where it was held to be a penalty, it was described in the contract as liquidated damages.

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## SECTION II.—MORTGAGES AND LIENS.

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### CHAPTER I.

#### NATURE OF A MORTGAGE.

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#### ART. CXIX.—*Definition of a Mortgage.*

(1) A mortgage for the purposes of this section may be defined as an assurance of a proprietary interest in land by a borrower (who is called the *mortgagor*) to a lender (who is called the *mortgagee*) made for the purpose of securing the repayment of a loan (which is called the *mortgage debt*) and conditioned expressly or impliedly to become absolute on the failure of the borrower to repay the loan.

(2) When the proprietary interest assured is a legal interest the mortgage is called a *legal mortgage*. When it is an equitable interest it is called an *equitable mortgage*.

(3) A mortgage made by a mortgagee is called a *sub-mortgage*. A mortgage where each of several mortgagees advances a share of the loan is called a *contributory mortgage*.

#### PARAGRAPH (1).

It is to be noted that the summary of the law contained in this section is limited to mortgages of land. Mortgages are also made of choses in possession, but the law as to these is now contained in the Bills of Sale Acts, 1878 and 1882 (see Stra. Property, p. 218), and forms no part of equity. Again there are mortgages of choses in action. The law as to these seems to be the same, so far as applicable, as that relating to mortgages of land (*Salt v. Marquis of Northampton*, [1892] A. C. 1) save that sometimes the right of foreclosure does not apply (see *infra*, Art. CXIX.), and there is an implied right of sale to be reasonably exercised (*Stubbs v. Slater*, [1910] 1 Ch. 632) on the mortgagor making default of payment (*Deverges v. Sandeman, Clark and Company*, [1901] 1 Ch. 70).

In order that a transaction may amount to a mortgage it must transfer to the lender a proprietary interest in the land. This is what distinguishes a mortgage from a pledge. In a pledge only the possession of the thing pledged passes. Mortgage (in Latin *mortuum vadum*; in French *mort gage*) in reality means a pledge, but pledges (in the present sense of the word) of land, if they ever existed, are now unknown. Pledges of chattels are, however, common enough. These are now, when the article pledged is of small value, within the Pawnbrokers Act, 1872 (see Stra. Property, p. 223).

A mortgage must not merely transfer a proprietary interest, but it must transfer it as security for a loan. This is what distinguishes a mortgage from a conditional sale. The importance of this distinction will appear from the note to the next Article.

A mortgage must also be an assurance conditioned to become absolute on failure to pay the mortgage debt. It

was this condition which gave equity the opportunity of interfering. As was pointed out in dealing with Relief against Forfeiture, the forfeiture of the mortgaged land on the mortgagor's failure to pay a mere money debt was by the rules of equity a forfeiture in the nature of a penalty. Equity therefore, in accordance with its principles, relieved against it. This point, too, will be considered further in the note to the next Article.

There are some mortgages which do not result in forfeiture on failure to pay. As has been pointed out, mortgages of choses in action, or indeed of choses in possession, only confer a right of sale. Sometimes there are mortgages of land made by way of power of sale which give rise to no forfeiture. These are of too little importance to be separately considered in a work like this. For practical purposes, when one speaks of a mortgage of land one always means a mortgage of the nature described in the Article.

#### PARAGRAPH (2).

There may be many different legal interests in the same plot of land, but there can be only one legal mortgage of one legal interest—the one which transfers the legal title to that legal interest. On the other hand, there may be many equitable mortgages of the same interest, legal or equitable. Thus the owner of Blackacre may mortgage it to A., then, subject to A.'s mortgage, to B., then, subject to A.'s and B.'s mortgages, to C., and so on as long as he can get any one to lend him any money on it. The important point to note is that as there can be only one legal mortgage, once a legal mortgage is given all those following it must be equitable.

Equitable mortgages confer equitable interests in the land, and the rules set out in Arts. IX.—XV. (*supra*) apply to them equally with equitable interests arising under trusts express or otherwise. It will not be necessary, therefore, to say here anything as to the priority, etc., between them. The only doctrine applying exclusively to equitable mortgages is that of tacking, which we will

consider when we come to deal with the restrictions on the right to redeem (*infra*, Art. CXXXV.).

Equitable mortgages may arise because the mortgagor has only an equitable interest to transfer, as in the case of the owner of Blackaere after he has given a legal mortgage (*supra*), or as in the case of a cestui que trust mortgaging his interest under the trust. They may also arise owing to the form of assurance used in effecting the mortgage being such as equity only recognises. To create a legal mortgage of land a deed must be used, as nothing else will transfer the legal title to an interest in land, however small (Stra. Conveyancing, p. 27). But an equitable interest (other than an equitable estate in tail) may be transferred by mere writing unsealed (*ibid.*, p. 33), or when it does not arise under a trust, even without writing (Stra. Property, p. 219). Thus a usual way of creating an equitable mortgage is by depositing the title deeds of the property to be mortgaged with the lender. This creates a good mortgage in equity (*Russel v. Russel* (1783), 1 Bro. C. C. 269). In general the incidents of these mortgages are the same—so far as equity is concerned—as the incidents of mortgages created by deed, but it will be observed that most of the powers given by the Conveyancing Act, 1881, etc., relate only to mortgages by deed (see *infra*, Art. CXXVIII.).

For the form of an ordinary mortgage deed, see Stra. Conveyancing, pp. 228—231.

#### PARAGRAPH (3).

Thus if A. mortgages land to B. and B. afterwards mortgages it to C. the mortgage to C. is a sub-mortgage. If, on the other hand, B. and C. each advanced half of the mortgage loan to A., this mortgage would be a contributory mortgage.

Trustees are not permitted to advance trust money jointly with others on a contributory mortgage (*Stokes v. Prance*, [1898] 1 Ch. 212).

ART. CXX.—*The First Essential Characteristic  
of a Mortgage.*

(1) The first essential characteristic of a mortgage is the mortgagor's *right to redeem*.

(2) By the mortgagor's right to redeem is meant that a mortgagor, notwithstanding any condition or stipulation to the contrary contained in the mortgage agreement, is entitled, on repaying the mortgage debt with interest and costs, to call upon the mortgagee to re-transfer to him the mortgaged interest and to discharge him and it from all legal obligations arising out of the mortgage agreement.

(3) The right to redeem is inchoate until the time for repaying the mortgage debt, according to the mortgage agreement, arrives. It then becomes complete. In a legal mortgage, if it is not exercised immediately it becomes complete, it is lost at law for ever. But in equity, whether the mortgage be legal or equitable, the right to redeem continues until it is determined in some of the ways hereinafter stated.

PARAGRAPHS (1) AND (2).

The principle stated here is usually summed up in the maxim “Once a mortgage always a mortgage.” By this is meant that once it is shown that a transfer of an interest in property was intended as security for the repayment of a debt, then no condition or stipulation introduced into the transaction will be permitted to turn it into a conditional sale (see note to paragraph (3)) or otherwise prevent the mortgagor from getting back his property free from obligation on his repaying the mortgage debt (see *Samuel v. Jarrah Timber and Wood Paving Corpora-*

*tion*, [1904] A. C. 323, at p. 329). In the words of Lord MACNAGHTEN in *Bradley v. Carritt*, [1903] A. C. 253, at p. 261, "Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." Any such device or contrivance is called a *clog on the right to redeem*.

The following points should be noted with regard to clogs :

(1) The stipulation in order to be a clog must form part of the mortgage agreement. The ground on which a Court of Equity held any stipulation giving the mortgagee a greater right than the right to have his debt repaid at the date fixed for redemption to be invalid was based on the view that mortgagor and mortgagee were not dealing on equal terms. The mortgagor was presumably in need of money, the mortgagee in possession of money. Therefore the court interfered to protect the weaker party—as it often did (see *supra*, Arts. CXIV. and CXV). Once, however, the mortgage is made the mortgagor has got the money he wants. If he chooses subsequently by a new agreement to release his right of redemption to the mortgagee, there arises no ground of relief from such agreement (*Reere v. Lisle*, [1902] A. C. 461).

(2) A stipulation postponing the right to redeem for a reasonable time is no clog on the right of redemption. The usual period fixed for repayment of the mortgage debt is the first date upon which interest on the mortgage debt becomes payable—that is, six months or three months after the date of the mortgage. But not infrequently there is a stipulation that the mortgagor shall not redeem until a much later date. Such a stipulation, if reasonable, is quite proper (*Biggs v. Hodlinott*, [1898] 2 Ch. 307). In *Morgan v. Jeffreys*, [1910] 1 Ch. 620, a stipulation that the mortgagor should not redeem until the elapse of twenty-eight years from the date of the mortgage was held unreasonable and void. And this was the case in *Fairclough v. Swan Brewery Company, Limited*, [1912] A. C. 565, where in a mortgage of a leasehold property the right to redeem was only to be exercised practically immediately before the expiration of the lease.

(3) A stipulation which gives the mortgagee during the continuance of the mortgage a right to other advantages than the mere payment of interest on the mortgage debt is not a clog on the right to redeem. Thus, where in the mortgage of a public-house there was a condition in the mortgage deed that the mortgagor would buy the beer sold on the mortgaged premises from the mortgagee during the continuance of the mortgage, this condition was held good (*Biggs v. Hoddinott*, [1898] 2 Ch. 307).

(4) Any stipulation which gives a right to the mortgagee against the mortgagor himself, or against the mortgaged property, after the mortgagor has paid off the full mortgage debt with interest and costs, is a clog on the equity of redemption. Thus, where a brewer advanced money on mortgage to a publican and there was a stipulation that whether the mortgage debt was meanwhile paid off or not the publican would continue for a certain period to buy his beer for sale in the mortgaged inn from the brewer:—*Held*, that after the mortgage debt was discharged the publican was no longer bound by the stipulation (*Noakes and Company, Limited v. Rice*, [1902] A. C. 24; Stra. Lead. Cas. p. 201).

In that case the stipulation was intended to bind the mortgaged property after the payment of the mortgage debt. Formerly it was thought that if it was intended only to impose an obligation on the mortgagor personally after payment it was not a clog (*Santley v. Wilde*, [1899] 2 Ch. 474). This has now been held bad law in *Bradley v. Carritt*, [1903] A. C. 253. There a mortgagor mortgaged property to a mortgagee, and in the mortgage agreement it was stipulated that the mortgagor would employ the mortgagee as broker to sell the tea of the mortgagor's company during the continuance of the mortgage and after the mortgage debt was paid off, or, if he did not, he would pay the mortgagee a commission on the tea sold. After the mortgage debt was paid off the mortgagor refused so to employ the mortgagee or to pay him commission:—*Held*, on action brought, that after redemption no action lay on the covenant.

Moreover, it should be noted that even when the collateral benefit given to the mortgagee determines with

the mortgage, the courts regard it with suspicion. If it is not reasonable they will treat it as being induced by the oppression of the mortgagee, and will hold it voidable (*James v. Kerr* (1889), 40 Ch. D. 449).

(5) Lastly, a stipulation giving the mortgagee a collateral benefit, even though exercisable only during the continuance of the mortgage, is a clog if the effect of its exercise will be to prevent the inchoate right to redeem ever becoming complete. Thus, in *Samuel v. Jarrah Timber and Wood Paring Corporation, Limited*, [1904] A. C. 323, a limited company mortgaged some of its debenture stock to S. The mortgage debt was to be paid off at any time after thirty days' notice on either side. The mortgage agreement gave the mortgagee the right to purchase the mortgaged stock at forty per cent. at any time within twelve months. Within the twelve months and before any notice to pay off the mortgage debt had been given, the mortgagee exercised his option to purchase the mortgaged stock:—*Held*, that the stipulation was void and the company was entitled to redeem.

### PARAGRAPH (3).

The right to redeem is an essential characteristic of a mortgage—that is, a transaction cannot be a mortgage without it. But a transaction may give a right to redeem and yet not be a mortgage. Thus, a conditional sale gives the vendor a right to redeem, yet a conditional sale is not a mortgage. The difference between them is that a mortgage is based on a loan, a conditional sale upon a price. Wherever the person to whom the property is transferred can sue the transferor for debt in case the transferor fails to redeem, the transaction is a mortgage.

As we shall see, the law did not distinguish between mortgages and conditional sales. In both cases it regarded the transaction as an out-and-out conveyance, subject to a condition to reconvey on payment of a certain sum of money. This condition, like all legal conditions, had to be strictly observed. If it were not fulfilled by the payment of the money on the day it was to be paid, the right to redeem was gone for ever. Equity sharply

distinguished. It refused to help the vendor on a conditional sale. A vendor is just as well able to look after himself as a purchaser, or is supposed to be till the contrary is shown, and so it was assumed that he had secured the fair price of his property. Accordingly, if he did not repurchase it when he had a chance, the court held there was no penalty. But a borrower is always regarded in equity as bargaining with a lender on unequal terms. It is assumed, therefore, that the amount he receives on the security of his property is not its full value—an assumption generally right. Accordingly to deprive him of his property for failing to repay the loan on the precise day was not merely a penalty in the technical sense, but a real injustice. On this ground equity intervened, and held that the mortgagor should have still a reasonable time after the legal forfeiture to redeem his estate. The next Article shows the limitation which is put on this continuance of the right to redeem.

Conditional sales are still occasionally made and are still strictly enforced, provided it can be shown that they are in fact sales and not in fact securities for repayment of debts. As a rule, no questions now ever arise on this, as a mortgage is always drafted in a form that clearly shows it was intended to be a mortgage. Where any such question does arise, the points the court will consider in deciding it are chiefly these: (a) Who paid the costs of the transaction? The practice is that the grantor pays them where the transaction is a mortgage and the purchaser where it is a sale. (b) Did the grantee take possession immediately? In mortgages the grantee seldom takes immediate possession; in sales the purchaser usually does. (c) Did the grantee, when he took possession, keep accounts of rents and profits? In mortgages, the mortgagee in possession must keep accounts, but, of course, in sales, the purchaser is under no such obligation. (d) Was the consideration given adequate as the price of the property or not?

Though the right to redeem is inchoate until the time fixed for the repayment of the mortgage debt arrives, yet if the mortgagee before that time brings an action for the

possession of the mortgaged land, the mortgagor is entitled to redeem at once (see *infra*, Art. CXXXIII). When no time is fixed for the repayment—which rarely happens except when the mortgage is by deposit of title-deeds—the right to redeem is complete from the first.

The right to redeem after the time fixed for redemption has passed exists notwithstanding any custom of trade to the contrary (*Ponsolle v. Webber*, [1908] 1 Ch. 254).

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#### ART. CXXI.—*The Second Essential Characteristic of a Mortgage.*

(1) The second essential characteristic of a mortgage is the mortgagee's *right to foreclose*.

(2) By the mortgagee's right to foreclose is meant that when the mortgagor's right to redeem has become complete, and he has failed to exercise it, the mortgagee is entitled to apply to the court for an order directing the mortgagor to redeem within a certain time, or in default be deprived for ever of his right to do so.

(3) Such an order is called an *order of foreclosure*.

When equity decided not to permit the mortgaged property to be forfeited merely because the mortgagor failed punctually to repay the mortgage debt, it never intended to deprive the mortgagee permanently of this remedy. Accordingly it gave him the right to foreclose described in the text, and so to appropriate to himself the mortgaged property towards the satisfaction of the mortgage debt.

This right to foreclose is simply then the right to ask the court to withdraw its relief against a forfeiture which is created by the mortgage (*Williams v. Morgan*, [1906] 1 Ch. 804). Accordingly it does not exist where there is no forfeiture created by a transaction by way of security for a debt. Thus, where a mortgage is made by way of sale—*i.e.*, giving the mortgagee simply power to sell in case the mortgagor makes default in payment—there is no right of foreclosure. Neither is there such a right in the case of pledges or liens. In all these cases, the right to redeem continues until the property mortgaged or charged has been actually sold to satisfy the debt. As to foreclosure of mortgages of choses in action, see Seton, p. 2000.

Where, however, there is a forfeiture, no stipulation in the mortgage deed can prevent the right to foreclose arising upon default in payment, though the court now in an action of foreclosure can, if it sees fit, direct a sale of the mortgaged property instead (see *infra*, Art. CXL.).

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## CHAPTER II.

## POSITION OF PARTIES UNTIL REDEMPTION OR FORECLOSURE.

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ART. CXXII.—*Mortgages at Law and in Equity.*

(1) At law, a legal mortgage being regarded as a sale subject to a condition of repurchase, after the mortgage all that remains in the mortgagor is the benefit of such condition, which carries with it no interest in the land mortgaged.

(2) In equity, a legal or equitable mortgage being regarded as a mere mode of securing a debt, after the mortgage all the interest in the mortgaged land remains in the mortgagor, subject to the mortgage debt. This interest is called his *equity of redemption*.

(3) These two principles fix the relative positions of the mortgagor and mortgagee, so

far as these are not altered by agreement or statute.

#### PARAGRAPH (2).

It was not until the middle of the eighteenth century that it was finally decided what the nature of a mortgagor's right in equity was. It was then held in *Casborne v. Searje* (1737), 1 Atk. 603, that it was an equitable estate in the land just as much as the interest of a cestui que trust under a declared trust. Indeed, the mortgagee is a constructive trustee of the land for the mortgagor, using that term in the wide sense (Art. XVII., *supra*). While the mortgagor is left in the possession of the land this is of no importance, but as soon as the mortgagee enters on the land, it will be seen that many of the duties of an ordinary trustee are immediately imposed upon him. His position then is that of a constructive trustee with a beneficial interest in the trust property.

The equity of redemption being then an ordinary equitable estate in the land, the rules laid down in Arts. IX.—XV. (*supra*) apply to it. The different mode in which it arises gave a peculiarity, however, which other equitable estates did not possess.

As we shall see, when a person dies his debts are primarily payable out of his general personal estate (see *infra*, Art. CCXVIII.). Now a mortgage, being in equity simply a borrowing transaction, the debt which it created was on the death of the mortgagor primarily payable out of his personal estate. The mortgagor might alter this by expressly directing in his will that the mortgaged land should be liable for the debt; and the rule did not apply where the debt was an *ancestral* one, that is, where the deceased owner of the equity of redemption was not the actual borrower. But in other cases the heir or devisee of the land could call on the executors or administrators to pay off the mortgage. That has now been altered as regards mortgaged estate devolving on death (see *infra*, Art. CCXVIII.). But the rule still applies where the mortgaged land is transferred by way of gift during the life

of the mortgagor (*In re Darby's Estate*, [1907] 2 Ch. 465). Where the equity of redemption is sold there is always, in the absence of an express provision on the point, an implied undertaking on the part of the assignee to indemnify the mortgagor against the mortgage debt (*Mills v. United Counties Bank, Limited*, [1911] 1 Ch. 669). Where, however, the mortgaged property is reversionary this indemnity arises only on the property vesting in possession (*ibid.*). As to the liability under a covenant of indemnity, see *Watling v. Lewis*, [1911] 1 Ch. 414).

The different views held by law and equity of the mortgagee's position created a peculiar situation where the mortgaged land was freehold or copyhold and the mortgagee died intestate. At law as he was owner of the legal title to the land, it vested in his heir. In equity as the whole transaction was regarded as a loan, the right to repayment vested in his personal representatives. This has, as far as freeholds are concerned, been put an end to by sect. 30 of the Conveyancing Act, 1881. But it still continues where the land is copyhold (Copyhold Act, 1887, sect. 45).

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#### ART. CXXIII.—*Position of the Mortgagor.*

(1) Where after a legal mortgage the mortgagor remains in possession of the mortgaged land, he is tenant at will of it to the mortgagee if he has attorned tenant, and tenant on sufferance if he has not so attorned.

(2) Though only a tenant of the mortgagee nevertheless the mortgagor in possession is entitled—

- (i) To receive all the rents and profits of the land and keep the same for his own use without in any way accounting for them to the mortgagee.

- (ii) To sue for the possession of the mortgaged land and for any rent or profit arising out of it or for any injury done to it, in his own name only, unless the cause of action arises under a lease or contract made by him and another person jointly (*Judicature Act, 1873*, sect. 25 (5)).
- (iii) To commit waste on the mortgaged land unless the land is so scanty a security for the mortgage debt that the waste endangers it.
- (iv) To grant leases of the mortgaged land, but unless he has express or statutory powers so to do such leases are not binding on the mortgagee.

(3) Where a mortgagor remains for twelve years in possession of the mortgaged land without paying any interest on the mortgage debt and without giving any written acknowledgment of the mortgagee's title, the title of the mortgagee to the land is extinguished.

#### PARAGRAPH (1).

For the difference between tenancies at will and tenancies on sufferance, see *Stra. Property*, 101, 102.

Mortgagors not infrequently were made to attorn tenants to the mortgagee at a rent equal to the interest on the mortgage debt in order to give the latter the right of distress in case the interest fell into arrear. Now, however, since there is usually an implied power (see Art. CXXXI.) to appoint a receiver, this is scarcely necessary. Where, however, there is no attornment the mortgagor in possession is, as has been said, merely a tenant on sufferance (*Scobie v. Collins*, [1895] 1 Q. B. 375). Attornment clauses are now seldom inserted in

mortgages, as unless the mortgage is registered under the Bills of Sale Acts they are void. When inserted it is usually for the purpose of enabling the mortgagee to obtain possession of the land by a judgment under R. S. C., Order 3, rule 6 (see *Hall v. Comfort* (1886), 18 Q. B. D. 11).

PARAGRAPH (2).

(ii) Before the Judicature Act, 1873, the position of a mortgagor in possession was this. As regards tenancies of the mortgaged land which commenced before the mortgage, he could not sue without joining the mortgagee as legal owner. He could distrain for arrears of rent, as the court held he had an implied authority to do so. As regards tenancies which commenced after the mortgage, he could sue in his own name. The ground of the distinction was that the former tenants could deny his right to sue, while the latter could not, without questioning his title to create the tenancy—a thing which no tenant is entitled to do. In the first case the tenant could say : “ You were entitled to create the tenancy, but you have since parted with your title.” In the second case he could only say : “ It is true you purported to make me a tenant, but you had no title then to the land, which belonged, in fact, to the mortgagee.”

(iv) Leases granted by a mortgagor in possession were good against himself as contracts between him and the lessees. But as against the mortgagee, who was legal owner, they were not binding against him unless he was party to them. When the mortgagee took possession he was entitled to repudiate, without notice, leases to which he was not a party (*Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454), but if he did so and the lease was a beneficial one he might be held responsible for the loss to the mortgaged estate as loss arising through his own wilful default (see next Article). If the mortgagee gives the tenant notice to pay the rents to him, or accepts rent, then the tenant becomes his tenant on a tenancy from year to year (*Keith v. R. Garzia and Company*, [1904] 1 Ch. 774).

PARAGRAPH (3).

This is independent of the effect of sect. 8 of the Real Property Limitation Act, 1874, which applies only to

remedies for the mortgage debt. By sect. 34 of the Real Property Limitation Act, 1833 (explained by the Real Property Limitation Act, 1837), as modified by sect. 1 of the Real Property Limitation Act, 1874, twelve years' possession, after the right of the true owner to eject the holder of the land accrued, without payment of rent or interest or written acknowledgment of the true owner's title, extinguishes the title of the true owner and creates a new title in the holder—even where the mortgaged property has been sold and is represented by funds in the hands of trustees or the court (*In re Hazeldine's Trusts*, [1908] 1 Ch. 34). An advowson, however, is not land within the meaning of the section (*Brooks v. Muckelston*, [1909] 2 Ch. 519).

Where a prior mortgagee has taken possession a subsequent mortgagee cannot, of course, do so without redeeming the prior mortgage; that, however, will not prevent the statute running against the subsequent mortgage (*Johnson v. Brock*, [1907] 2 Ch. 535).

#### ART. CXXIV.—*Position of the Mortgagee.*

The mortgagee's position after the execution of the mortgage may be summed up under the following heads:—

(1)—(i) Where the mortgage is legal, the mortgagee may take possession of the mortgaged land at any time, but under sects. 219 and 220 of the Common Law Procedure Act, 1852, if he takes proceedings to obtain possession the mortgagor may stay such proceedings by paying him the mortgage debt with interest and costs.

(ii) If he takes possession of the mortgaged land he is bound to keep accounts of

all the rents and profits received by him and all the outgoings paid by him, he must in such accounts make allowance of an occupation rent for any part of the mortgaged land occupied by him, he is liable for all rents and profits not actually received by him but which he might have received but for his wilful default, he is not entitled to commit waste unless the rents and profits of the mortgaged land are not sufficient to keep down the interest on the mortgage debt, and he is bound to keep the mortgaged land and the buildings on it in repair so far as the surplus rents and profits will allow.

(2) Where the mortgagee has taken possession, if he remains for twelve years in possession without acknowledgment in writing of the title of the mortgagor or of his right of redemption, the mortgagor's right to redeem is extinguished.

#### PARAGRAPH (1).

(i) There are two ways in which the legal right of the mortgagee as owner of the mortgaged land to take possession may be restricted. The first is by a covenant by the mortgagee in the mortgage deed not to take possession until default in paying the interest or principal of the debt. This at common law does not prevent the mortgagee bringing an action of ejectment, since it confers no interest in the land upon the mortgagor so as to entitle him to possession as against the mortgagee. If the mortgagee disregards it the mortgagor's remedy is an action for damages for breach of covenant. But equity, where there is such a covenant, would restrain the ejectment (*Green v. Burns* (1879), 6 L. R. Ir. 173). In the second place, the mortgagee may demise the mortgaged land to

the mortgagor for a term at a rent equal to the interest of the mortgage debt. Here the mortgagor has an interest in the mortgaged land as lessee, and accordingly the mortgagee cannot oust him except in accordance with the terms of the lease.

(ii) A mortgagee is held to have taken possession when he has done some act which practically deprives the mortgagor of the management or control of the mortgaged property, *ex. gr.*, by giving the tenants of the mortgaged land notice to pay their rents to him (*Heales v. McMurray* (1856), 23 Beav. 401). And taking possession of the mortgaged property is like accepting trust property ; having once taken the step, the mortgagee cannot abandon possession at his pleasure, but must be relieved of it by the court (*County of Gloucester Bank v. Rudry Merthyr Colliery Company*, [1895] 1 Ch. 629). Once in possession, he is liable not merely for all the rents and profits he actually receives, but, again like a trustee, for all he might have received but for his own wilful fault (*Noyes v. Pollock* (1886), 32 Ch. D. 53). At law he can commit waste or grant leases like any other legal owner, but equity will restrain him from doing so unless in the case of waste his security is deficient (*Millett v. Darey* (1862), 31 Beav. 470). After satisfying the outgoings of the estate, and keeping down the interest on his mortgage, he is bound to effect all necessary repairs as far as the surplus income will permit. (As to devoting the surplus income to reducing the mortgage debt, see Art. CXXXIV. (iii).) If he spends money of his own on permanent improvements, he is not entitled to charge these against the mortgagor. His sole right is that in taking accounts he will be entitled to claim for the expenditure so far as it has enhanced the value of the land (*Henderson v. Astwood*, [1894] A. C. 150).

Not merely is the mortgagee who takes possession bound to do all these duties without remuneration, but by taking possession he makes himself liable upon any onerous covenants affecting the land. These are very often extremely burdensome, especially in the case of leaseholds. The remedy by taking possession is, therefore, a double-edged one. To prevent a mortgagee being driven to it, it became

customary to insert in mortgage deeds a power enabling the mortgagee to appoint a receiver of the rents and profits of the land who would be the mortgagor's agent, and be paid by commission for his work. The office of receiver was an invention of equity, by means of which it secured a remedy to equitable mortgagees who, having no legal title, could not obtain possession of the land. As we shall see, now, by the Conveyancing Act, 1881, power to appoint a receiver is implied in all mortgages by deed unless a contrary intention appears.

In the case of leaseholds where the mortgage is made by way of assignment, the mortgagee becomes liable under the covenants of the lease without taking possession. To prevent this, it is now usual to make such mortgages by way of sub-demise, thus preventing privity arising between the lessor and the mortgagee of the lease, and so freeing the mortgagee of liability under the covenants till he chooses to take possession.

#### PARAGRAPH (2).

Though the mortgagee in possession is, in a sense, a constructive trustee for the mortgagor, yet by the Real Property Limitation Act, 1874, sect. 7, the mortgagor's right to recover the land under the circumstances stated is barred.

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#### ART. CXXV.—*Mortgagee's Personal Remedy against the Mortgagor.*

(1) As a mortgage is merely a security for a loan, then, unless the mortgagee has expressly agreed not to hold the mortgagor personally liable, on the loan becoming repayable the mortgagee can sue the mortgagor for its recovery independent of the mortgage.

(2) Where the mortgage deed contains no covenant for the repayment of the mortgage

debt, the mortgage debt is a simple contract debt, and, as such, may be barred by six years' non-claim after it becomes payable. Where the mortgage deed does contain a covenant for repayment, it is a specialty debt, and, as such, barable only after twenty years' non-claim. If, however, the mortgagee's rights as respects the mortgaged land have been barred by twelve years' non-claim under the Real Property Limitation Act, 1874, sect. 8, then he will not be allowed to recover the mortgage debt by an action on the covenant.

(3) An action for recovering the mortgage debt either in simple contract or on the covenant in no way prejudices the mortgagee's right to foreclose or to secure repayment in any other mode. It may be resorted to before or simultaneously with these other remedies, but if resorted to after a decree for foreclosure it will have the effect of reopening the foreclosure, and if the mortgagee is not in a position to restore the mortgaged lands, it will be estopped.

#### PARAGRAPHS (1) AND (2).

By sect. 8 of the Real Property Limitation Act, 1874, the remedy by action for money secured on land is barred by the lapse of twelve years since the last payment of interest or principal or the last written acknowledgment of the debt. The remedy on a covenant—that is, a contract under seal—continues for twenty years. But since the remedy in the case of a mortgage is primarily against the land, when it is barred by the statute as against the land the court holds that the personal remedy on the covenant is barred also (*Sutton v. Sutton*, 22 Ch. D. 511; Stra. Lead. Cas. p. 215; and see *Charter v. Watson*, [1899] 1 Ch. 175).

## PARAGRAPH (3).

The three remedies of a mortgagee are (1) foreclosure, (2) action on the covenant, (3) sale of the mortgaged estate. These three are concurrent, not alternative remedies. The exercise of one of them sometimes renders another impossible. Thus, if the mortgagee sells the mortgaged property, of course he cannot afterwards foreclose the mortgagor's equity of redemption. That went when the mortgagee exercised his power of sale, and for this reason it was once argued that the existence of an express power of sale in a mortgage deed was inconsistent with the right of foreclosure. The Conveyancing Act, 1881, sect. 20 (5), expressly provides that the power of sale implied by it shall not prejudice the right of foreclosure. Subject to this all remedies may be utilised at the same time. Thus a mortgagee may claim in the same writ foreclosure and judgment on the covenant (*Dymond v. Croft* (1876), 3 Ch. D. 512). Or he may sue on the covenant and foreclose for the unsatisfied balance of his debt (*Rudge v. Richens* (1873), L. R. 8 C. P. 358). But if he forecloses and afterwards parts with the property, he cannot then sue on the covenant, since if he recovered judgment on the covenant he could not restore the mortgaged property on the mortgagor paying the mortgage debt. And on his obtaining a decree *nisi* for foreclosure, he cannot sell under a power of sale without the consent of the court (*Stevens v. Theatres, Limited*, [1903] 1 Ch. 857). And where he brings a foreclosure action in the Chancery Division (in which he is entitled to claim a personal order for payment of principal and interest against the mortgagor) he will not be allowed to issue while the Chancery action is pending a specially indorsed writ in the King's Bench to recover the principal and interest (*Williams v. Hunt*, [1905] 1 K. B. 512).

For the form of a judgment on the covenant and for foreclosure or sale if necessary, see Stra. Mortgages, pp. 152 and 156 *et seq.*

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**ART. CXXVI.—*Express and Implied Incidents of Mortgages.***

Subject to the mortgagor's right to redeem and the mortgagee's right to foreclose, any other incidents in addition to those above mentioned may be attached to a mortgage by express agreement between the mortgagor and mortgagee. Those which formerly it was customary so to attach are now generally implied under the provisions of the Conveyancing Act, 1881, in all mortgages executed since December 31, 1881.

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**ART. CXXVII.—*Implied Incidents where Mortgagor or Mortgagee is in Possession.***

A. (1) Whether the mortgage is made by deed or not, under sect. 18 of the Conveyancing Act, 1881, a mortgagor or mortgagee in possession is entitled to make the following leases, which will, when made by the mortgagor, be binding on the mortgagee, and when made by the mortgagee will be binding on the mortgagor and prior mortgagees :

- (i) An agricultural or occupation lease for any term not exceeding twenty-one years; and
- (ii) A building lease for any term not exceeding ninety-nine years.

(2) Every such lease is to be made at the best rent reasonably obtainable, and to take effect in possession not later than twelve months after its date; and building leases are to be in consideration of the lessee having erected or agreeing to erect or repair buildings within five years, and having executed or agreeing to execute within

that time an improvement on the land, and a pepper-corn rent may be reserved in such lease during the first five years.

(3) This power does not enable a lease to be granted which the mortgagor could not have granted had he not mortgaged his land, and it is implied only if and in so far as no contrary intention is expressed in the mortgage deed, or otherwise in writing.

(4) Where the lease is by the mortgagor he must within one month after making the lease deliver to the mortgagee a counterpart of the lease executed by the lessee.

B. (1) By sect. 3 of the Conveyancing Act, 1911, a mortgagor or mortgagee in possession may, for the purpose only of granting a lease authorised by sect. 18 (*supra*) or by the mortgage deed of the land or minerals, accept the surrender of an existing lease or agreement for a lease.

(2) Where any consideration is given to the mortgagor for the surrender beyond the acceptance of the new lease the surrender will not be valid without the consent of the incumbrancers.

(3) The surrender shall not be valid unless a new lease is accepted within a month.

(4) After the appointment of a receiver the powers of leasing and accepting surrenders are to vest in the mortgagee appointing such receiver.

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ART. CXXVIII.—*Implied Incidents where the Mortgage is by Deed.*

(1) Where the mortgage is made by deed under sect. 19 of the Conveyancing Act, as

amended by sect. 4 of the Conveyancing Act, 1911, a mortgagee has the following powers to the like extent as if they had been in terms conferred by the mortgage deed and not further :

- (i) A power to sell the mortgaged property or any part of it, either subject to prior charges or not, by public auction or private contract, and where the mortgage was executed after December 31, 1911, the mortgagee may on sale of part of the land impose restrictive covenants on the land not sold or reserve restrictive covenants on the land sold, and on sale of the minerals apart from the land may grant or reserve wayleaves.
- (ii) A power to insure and keep insured against fire any insurable property forming part of the mortgaged property, and to add the premiums paid to his mortgage debt.
- (iii) A power to appoint a receiver of the income of the mortgaged property, or any part of it.
- (iv) A power when in possession to cut timber ripe for cutting, and not planted for ornamental purposes, or to contract for such cutting to be completed within twelve months at most from the making of the contract.

(2) These powers are implied only in so far as no contrary intention is expressed in the mortgage deed, and may be varied or extended by such deed.

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**ART. CXXIX.—*Implied Power of Sale.***

(1) The power of sale referred to in the preceding Article cannot be exercised by the mortgagee unless :

The mortgage debt has become payable and—

- (i) Notice requiring payment has been given to the mortgagor, and he has made default in payment for at least three months; or
- (ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii) There has been a breach of some covenant in the mortgage deed or implied by the Conveyancing Act on the part of the mortgagor, other than that for the payment of the mortgage debt or interest.

(2) The mortgagee on sale can convey by deed to the purchaser the interest mortgaged, discharged of all other interest ranking after his mortgage.

(3) The sale cannot be impeached on the ground that no case has arisen which authorises the mortgagee to exercise his power of sale. If he has improperly exercised it, the mortgagor's remedy is an action for damages against him.

(4) The purchase money received by the mortgagee is to be applied to the following purposes and in the following order :

- (i) In discharge of prior incumbrances (if any) to which the sale is not made subject.
- (ii) In payment of the costs of the sale.
- (iii) In discharge of the mortgagee's own debt and any interest due upon it.

The balance he is to hold in trust for the person entitled to the mortgaged property or authorised to give receipts for the proceeds of the sale thereof.

(5) As soon as the power of sale becomes exercisable, the mortgagee may demand and recover from any person, save a mortgagee entitled in priority to him, all the documents of title which a purchaser could demand and recover from him.

(6) The mortgagee's receipt for the purchase money is a complete discharge to the purchaser, who is not concerned to inquire whether any money is owing on the mortgage or not (sects. 20, 21, and 22, Conveyancing Act, 1881, and sect. 5, Conveyancing Act, 1911).

The following points are to be remembered in connection with a power of sale : (1) A puisne mortgagee may exercise the power of sale, but without the concurrence of the prior mortgagee he can only sell the equity of redemption mortgaged to him (*In re Hodson and Howes' Contract* (1887), 35 Ch. D. 668). (2) The power is conferred upon the mortgagee for his own benefit. He accordingly in exercising it is under no obligation to consult the interests of the mortgagor. Thus, for example, it is no impeachment of its exercise to show that he sold at a bad season, and that had he held his hand for a time he might have secured a better price (*Farrar v. Farrars, Limited* (1888), 40 Ch. D. 395 ; and see *Nutt v. Easton*, [1900] 1 Ch. 29). Provided he acts honestly he is not liable for any loss resulting from its exercise (*Kennedy v. De Trafford*, [1897] A. C. 180). (3) In exercising it he is a trustee to the extent that he cannot buy from himself. This principle has been carried very far in the case of *Hodson v. Deans*, [1903] 2 Ch. 647. There a building society which was mortgagee of a property sold it by auction under its power of sale. An officer of the society, who had probably fixed the reserved price and instructed the auctioneer, attended the sale and bought it for himself. The sale was at a small undervalue : —*Held*, that it was invalid. (4) A mere general power

of attorney does not entitle the agent of the mortgagee to exercise the power to sell (*Re Dowson and Jenkins's Contract*, [1904] 2 Ch. 219). (5) The mortgagee is a trustee of the surplus of the purchase money for the persons entitled thereto. If he has no notice of incumbrances subsequent to his own, he is entitled, like any other trustee (see *supra*, Art. XLIV.), to assume that the mortgagor has not alienated his equity of redemption, and to pay over the surplus to him (*Thorne v. Heard and Marsh*, [1895] A. C. 495).

The default in payment of principal mentioned in (1) (i) is three months after the date of the notice (*Barber v. Illingworth*, [1908] 2 Ch. 20).

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#### ART. CXXXX.—*Implied Power to Insure.*

(1) The power to insure referred to in Art. CXXVIII. does not arise—

- (i) Where there is a covenant to insure in the mortgage deed and the mortgagor has insured in accordance with it.
- (ii) Where there is no such covenant and the mortgagor has insured to the extent the mortgagee is entitled to insure under the power.

(2) The mortgagee is entitled to insure under the power only to the extent of two-thirds of the value of the insured property.

(3) All money received under the insurance, whether made under the mortgage deed or under the power, is at the option of the mortgagee to be used in restoring the insured property or (subject to any obligation to the contrary) in repaying the mortgage debt (sect. 23, Conveyancing Act, 1881).

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**ART. CXXXI.—*Implied Power to Appoint a Receiver.***

(1) The appointment, position, and duties of a receiver referred to in Art. CXXVIII. are regulated by the following rules :

- (i) He cannot be appointed until the mortgagee's power of sale referred to in the same Article has become exercisable.
- (ii) He, though appointed by the mortgagee, is deemed to be the agent of the mortgagor.
- (iii) He is entitled to recover the income of the mortgaged property in the name of either the mortgagor or mortgagee.
- (iv) Any person paying him income is not concerned to inquire whether any case has happened to authorise the receiver to act.
- (v) He must be appointed in writing under the hand of the mortgagee, and he may be removed and a new receiver appointed in the same way.
- (vi) He is entitled to keep out of the income commission at such rate, not exceeding 5 per cent., as is specified in the instrument appointing him, or, if no rate is so specified, then at the rate of 5 per cent., or at a higher rate if allowed by the court.

(2) Income paid to the receiver shall be applied by him to the following purposes :

- (i) In discharge of outgoings of the mortgaged property.
- (ii) In keeping down all annual or other payments, and interest on all principal sums, having priority to the mortgage in right of which he is appointed.
- (iii) In payment of his own commission, premiums of insurance properly payable under the mortgage deed, and costs of necessary or proper repairs directed in writing by the mortgagee.
- (iv) In payment of the interest on the mortgage debt of the mortgagee appointing him.

The balance he is to hand over to the person who, but for the possession of the receiver, would be entitled to the income of the mortgaged property, or who is otherwise entitled to that property (sect. 24, Conveyancing Act, 1881).

A later or *puisne* mortgagee is not entitled to appoint a receiver unless the prior mortgagee does not wish to do so, or unless the *puisne* mortgagee is prepared to redeem the prior mortgage. Even when a *puisne* mortgagee has appointed a receiver, if the prior mortgagee demands possession he is entitled to it and to all the rents received by the receiver after notice of the demand (*Preston v. Tunbridge Wells Opera House, Limited*, [1903] 2 Ch. 323 ; and see the position of a receiver appointed under the above implied power considered by KEKEWICH, J., in *White v. Metcalfe*, [1903] 2 Ch. 567).

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## CHAPTER III.

## RIGHT TO REDEEM.

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ART. CXXXII.—*Extent of the Right to Redeem.*

(1) Any person who has any interest in the equity of redemption of the whole or any part of the property included in a mortgage is entitled to redeem the whole of such property.

(2) Any person will be deemed to have an interest in the equity of redemption where he is liable to be and is sued for any part of the mortgage debt or any interest due upon it.

(3) Where there are two or more persons interested in the equity of redemption, the right to redeem will be exercisable by them successively in the order of time in which their different interests arose, or, where the same interest is enjoyed by them in succession, in the order in which it vests in them.

(4) Where the person seeking redemption is a puisne mortgagee, he is entitled to redeem the prior mortgages, if more than one, only in the

order in which they precede his mortgage, and only by foreclosing all the mortgages (if any) subsequent to his own.

(5) By sect. 25 (1) of the Conveyancing Act, 1881, any person entitled to redeem mortgaged property may in an action of redemption have judgment for sale instead of redemption. The court may order a sale without deciding the priorities of different mortgagees, and it may give the conduct of the sale to any defendant.

#### PARAGRAPH (1).

By an interest in the equity of redemption is meant an interest binding on its owner, the mortgagor, whether such interest is or is not binding also on the mortgagee. Thus, in *Tarn v. Turner* (1888), 39 Ch. D. 457, a mortgagor in possession prior to the Conveyancing Act, 1881, agreed in writing to grant a lease. The mortgagee did not join in the agreement. It was therefore not binding against him. It was, however, binding against the mortgagor:—*Held*, that the intended lessee was entitled to redeem. In the words of COTTON, L.J. (at p. 465), “The interest which he got” (under the agreement) “from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time.” If, however, the agreement had not been binding on the mortgagor—as, for instance, if it had been an option to purchase not founded on value—the party to it would take no interest in the equity of redemption, and would not be entitled to redeem (*Pearce v. Morris* (1869), L. R. 5 Ch. 227).

The person to be entitled to redeem need not be interested in the equity of redemption of the whole property. If he is interested in the equity of redemption of any part of it he may redeem the whole. Of course, he

redeems subject to the equities of all other persons interested (see *per COTTON, L.J.*, in *Tarn v. Turner* (1888), 39 Ch. D. 457, at p. 466). A judgment creditor who has got a receiving order against the mortgagor's property is interested in the equity of redemption and entitled to redeem (*In re Parbola, Limited*, [1909] 2 Ch. 437).

#### PARAGRAPH (2).

The most ordinary case of this is that of a mortgagor who, after he has sold his equity of redemption, is sued upon the covenant for the mortgage debt. He is entitled to redeem on payment of the debt and have the mortgaged property reconveyed to him, subject to such equity of redemption as may be subsisting in any other person, as, for instance, his assignee of the equity (*Kinnaird v. Trollope* (1888), 39 Ch. D. 636, at p. 647).

#### PARAGRAPHS (3) AND (4).

Thus, if Blackacre is mortgaged to A., then to B., and afterwards to C., B. is entitled to redeem before C. and C. before the mortgagor. Again, if Whiteacre is mortgaged by X. to Y., and afterwards X.'s equity of redemption is settled on F. for life and then on G., F. is entitled to redeem before G. Again, in the case of Blackacre (*supra*), if B. refused to redeem, and C. wished to do so, he must redeem B.'s mortgage before he is entitled to redeem A.'s. Not only so, but if B. brought an action to redeem A.'s mortgage he would have to join C. and the mortgagor and claim to foreclose them (*Teeran v. Smith* (1882), 20 Ch. D. 724, at p. 729). This rule should be read in connection with that as to foreclosure (see Art. CXXXVIII., *infra*). Together they constitute the rule that a puisne mortgagee may foreclose without redeeming but cannot redeem without foreclosing.

#### PARAGRAPH (5).

The advantage of selling without settling the priorities between the various incumbrances of the same property

may be shown by an example. Take the case of Blackacre, *supra*. Say A.'s mortgage's priority is undisputed, but there is a dispute as to whether B. or C.'s mortgage is to rank next to his. If on the sale of Blackacre the proceeds are sufficient only to pay the expenses of sale and the debt due to A., this dispute ceases to be of importance, and the cost of settling it is avoided by selling without deciding that dispute (see *General Credit, etc. Company v. Glegg* (1883), 22 Ch. D. 549).

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### ART. CXXXIII.—*Conditions of Redemption.*

(1) If the right to redeem is exercised on the precise day fixed in the mortgage for the repayment of the mortgage debt, the redemption may be claimed without notice. If, however, such day is past, then the person wishing to redeem must give the mortgagee six months' notice of his intention to redeem, or tender six months' interest over what is due on the mortgage in lieu of such notice, unless (i) the mortgagee himself claims repayment, or (ii) the mortgage is made by deposit of title-deeds.

(2) On redemption the person redeeming must pay the mortgage debt with interest and costs, as determined by the principles stated in the next Article.

(3) Where another mortgage or advance has become tacked to or consolidated with the mortgage relating to the property which it is desired to redeem, this mortgage or advance must also be discharged before redemption of the property contained in the original mortgage can be claimed.

## PARAGRAPH (1).

If the mortgagor repays the mortgage debt on the day fixed for repayment, he exercises his *legal* right under the mortgage, and is entitled to an immediate reconveyance of the mortgaged property. If he does not do so, his legal right to redeem is gone, and he must appeal to equity to assist him to get the mortgaged property back. Equity will assist him only on terms of his doing equity. One of these terms is that he should give the mortgagee reasonable notice of his intention of repaying the debt in order to afford the mortgagee time to find another investment for his money. If, however, the mortgagee demands repayment, he is entitled to repay at once (*Smith v. Smith*, [1891] 3 Ch. 550), and the mortgagee is not entitled, once he has demanded payment, to withdraw the demand and claim notice (*Santley v. Wilde*, [1899] 1 Ch. 747, at p. 763). Entering into possession of the mortgaged land is a demand for repayment (*Bovill v. Endle*, [1896] 1 Ch. 648).

In the case of a mortgage by deposit, where the accompanying memorandum (if any) does not otherwise provide, the mortgagor may redeem at any time (*Fitzgerald's Trustees v. Mellersh*, [1892] 1 Ch. 385). This is because such mortgages are made merely for temporary purposes—for instance, with a banker to secure the depositor's overdraft—and are not taken by the mortgagee as an investment (*ibid.*).

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**ART. CXXXIV.—*Interest and Costs payable on Redemption.***

Upon redemption interest and costs will be given to the mortgagee upon the following principles :

## (1) As to interest—

- (i) Where the rate of interest is fixed by the mortgage agreement, all arrears of interest at that rate.
- (ii) Where no rate of interest is fixed by the mortgage agreement, interest at the rate of 4 per cent. per annum ; and where the rate is fixed only up to the time agreed for repayment of the mortgage debt, interest after such date at the fixed rate, provided it does not exceed 5 per cent. per annum.
- (iii) Even where the mortgagee has taken possession, and his accounts under Art. CXXIV. show that he has each year received more net income than was sufficient to pay the interest on the mortgage debt, he will still be allowed interest upon the whole amount of the mortgage debt until the debt is wholly paid off, unless (a) he took possession before any interest on the debt was in arrear, or (b) the mortgage agreement shows that it was intended that he should accept repayment piecemeal.

Where the surplus of income over interest is deducted each year from the amount of the mortgage debt, leaving the balance only bearing interest, the account is said to be taken with *annual rests*.

## (2) As to costs—

The general rule is that the mortgagee will be allowed all costs incurred in perfecting, maintaining, and realising his security, and, if he takes possession, all charges and expenses reasonably incurred in collecting the income and managing the property; and, if a solicitor, he can charge for personal services, where the work done is such as he would have been entitled to charge against the mortgagor had he retained another solicitor to do it, and where there has been a redemption action, the costs of such action as between party and party. But where the redemption action was necessitated by the mortgagee's misconduct, the court may refuse him the costs of the action and even order him to pay the mortgagor's costs.

## PARAGRAPH (1).

(i) When a mortgagor claims redemption the court will grant it only on the terms that he pays all arrears of interest, notwithstanding that sect. 42 of the Real Property Limitation Act, 1833, makes only six years' arrears of interest recoverable (*Dingle v. Coppen*, [1899] 1 Ch. 726 ; approved by the Court of Appeal in *Re Lloyd*, *Lloyd v. Lloyd*, [1903] 1 Ch. 385). The same rule applies where the mortgaged property has been sold and the mortgagor claims the surplus proceeds (*Re Lloyd*, *Lloyd v. Lloyd, supra*), or in any other case where the mortgagor has to claim the aid of equity to obtain relief. This rule is based, not on the legal rights of the parties, but on the principle just mentioned—that he who seeks equity must do equity. As we shall see, when the mortgagee claims his legal rights the rule does not apply (*infra*, Art. CXXXVIII.).

It must be remembered that if the rate of interest fixed is to be increased on failure to pay punctually, the

increase is held to be in the nature of a penalty, and equity will allow only the rate payable on punctual payment.

(ii) The ground upon which interest is in these cases allowed is not very definitely fixed. Probably the true ground is that he who seeks equity must do equity (*Booth v. Leycester* (1838), 3 My. & Cr. 459). Some judges, however, have put it on implied contract (see *Re Kerr's Policy* (1869), L. R. 8 Eq. 331). As to the case where interest is fixed only up to the time for repayment, it may be put on the same ground, or it may be justified as damages for failure to repay the mortgage debt at the proper date under Lord Tenterden's Act, 1838, sect. 28.

(iii) It is a rule that a mortgagee is not bound to take the repayment of his debt piecemeal. Accordingly when he takes possession his accounts are kept simply by entering receipts to his debit and interest and outgoings to his credit. These are not made up until redemption is claimed. Then debits and credits are each added up, and the surplus of receipts over outgoings and interest is deducted from the amount of the mortgage debt.

If, however, he has agreed to accept payment piecemeal, or has taken possession before there are any arrears of interest, the accounts are not balanced merely upon redemption, but at the end of each year. The surplus of receipts is then deducted from the mortgage debt, and interest henceforth is payable only on what remains of it.

Even if the receipts are not confined merely to the ordinary income of the mortgaged property, but are increased by the sale of part of it, this will not be enough to entitle the mortgagor to a rest as to the ordinary income (*Wrigley v. Gill*, [1905] 1 Ch. 241; *Ainsworth v. Wilding*, [1905] 1 Ch. 435).

A clause is sometimes inserted in mortgage deeds permitting the mortgagee to add all arrears of interest to the capital of the mortgage debt so that they shall bear interest. This corresponds to the practice of allowing

yearly rests, except that instead of being for the benefit of the mortgagor it is for the benefit of the mortgagee. In taking accounts the court has no power to allow interest on arrears ; it must be allowed by an express provision in the mortgage deed. And where there is such a provision and the mortgagee takes possession, if the profits he receives are equivalent to or greater than the interest accruing on the mortgage, he will not be permitted to treat the interest as in arrear (*Wrigley v. Gill*, [1906] 1 Ch. 165).

#### PARAGRAPH (2).

Costs incurred in negotiating for the loan cannot be added to the mortgage debt (*Wales v. Carr*, [1902] 1 Ch. 860) ; but the costs of the mortgage deed, where the mortgagor has given a promise to make one if required, the costs of protecting the security, and costs of redemption or foreclosure action can be so added (*Re New Zealand Midland Railway Company*, [1901] 2 Ch. 357 ; and see *National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582. And as to expenses of management, see *per FARWELL*, J., in *Powell v. Brodhurst*, [1901] 2 Ch. 160, at p. 167).

It is the duty of the mortgagee to hand the mortgagor the title deeds of the mortgaged property together with a reconveyance of it on the mortgagor proffering him the mortgage debt with proper interest and costs ; and where the mortgagee refuses wilfully to do so the court will hold him liable for all costs subsequently incurred owing to such refusal (*Rourke v. Robinson*, [1911] 1 Ch. 480). But the refusal must be wilful. When a vesting order is necessary, if its necessity does not arise from the mortgagee's default the mortgagor must bear the costs (*Webb v. Crosse*, [1912] 1 Ch. 323).

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ART. CXXXV.—*Tacking Mortgages.*

Where there is a legal mortgage subsisting, and a subsequent equitable mortgagee advances money upon the mortgaged property without notice of any preceding equitable mortgage, such mortgagee, if he has or afterwards acquires the legal mortgage, will be entitled to the same priority for his equitable as he has for his legal mortgage. The equitable mortgage is said then to be *tacked* to the legal mortgage.

This doctrine of tacking, as it is usually called, is often discussed as if it were a doctrine applicable only to mortgages. It, however, applies to equitable interests, in whatever way they arise, and has been already sufficiently treated in connection with equitable interests generally (*supra*, Art. IX.). It is here mentioned only for the purpose of reminding the reader of its peculiar application to mortgages.

Sometimes a mortgagee takes a legal mortgage to secure, not merely the loan made at the date of the mortgage, but subsequent advances. In this connection it is always to be remembered that the right to tack is based on the subsequent mortgagee having no notice of an intervening equity at the time he advanced his money. If he has such notice, he cannot tack against the intervening equity, whatever may be his agreement with the mortgagor as to further advances. That agreement is rendered void by the mortgagor's accepting a loan on the security of the land from another person than the mortgagee (*West v. Williams*, [1899] 1 Ch. 132; Stra. Lead. Cas., p. 207).

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**ART. CXXXVI.—*Consolidation of Mortgages.***

Where two mortgages made by the same mortgagor, but affecting different properties, are or become vested in one mortgagee, such mortgagee will be entitled, as against the mortgagor and his subsequent assigns of his equity of redemption, to consolidate such mortgages into one mortgage for the aggregate of the different mortgage debts upon the aggregate of the different properties. Provided—

- (i) One of such mortgages contains a clause permitting such consolidation;
- (ii) The times fixed for the repayment of the different mortgage debts have expired;
- (iii) The mortgagor has not assigned his equity of redemption under one or both of the mortgages before the two mortgages became vested in the same person.

Formerly the right to consolidate mortgages made by the same mortgagor, but affecting different properties, was unlimited, unless the mortgage instruments contained a clause forbidding consolidation. This rule has been reversed by sect. 17 of the Conveyancing Act, 1881, which enacts that where the mortgages or one of them are or is made after the commencement of the Act, there is to be no right of consolidation unless a contrary intention appears.

- (i) The contrary intention may appear only in one of the various mortgages. Thus, in *Re Salmon, Ex parte the Trustee*, [1903] 1 K. B. 147, a mortgagor mortgaged Blackacre to A. Afterwards he again mortgaged it to B. Afterwards he again mortgaged it and

some other property to C. The mortgage to A. alone contained a clause permitting consolidation. On the bankruptcy of the mortgagor, B. took transfers of A.'s and C.'s mortgages :—*Held*, that the C. mortgage could not be redeemed by the mortgagor's trustee in bankruptcy without his also redeeming the mortgages A. and B.

Where a mortgagor by deposit has agreed to execute a legal mortgage when required, a clause permitting consolidation is not a usual condition which the mortgagee is entitled to have inserted in the legal mortgage when that is made (*Farmer v. Pitt*, [1902] 1 Ch. 954).

(ii) and (iii) The rules as to consolidation of mortgages may be summed up thus :

(a) Where an owner mortgages two or more properties to the same person he or any assignee of the equity of redemption on one of the mortgages can redeem it when the mortgage debt becomes payable without redeeming the other or others. This is a legal right arising under the mortgage contract (*Jennings v. Jordan* (1881), 6 App. Cas. 698 ; Stra. Lead. Cas., p. 211).

(b) If the mortgagor or his assignee do not do so, the mortgagee is entitled to consolidate the two debts and refuse to allow one to be redeemed without the other (*Hughes v. Britannia Benefit Society*, [1906] 2 Ch. 60).

(c) Where the different mortgages were originally made to different persons the same rules apply to assignees of the equity of redemption where the assignments were made after the mortgages became vested in the same person (*Minter v. Carr*, [1894] 3 Ch. 498).

(d) A *puisne* mortgage is, of course, an assignment of the mortgagor's equity of redemption.

(e) There is no consolidation unless where the different mortgages were made by the same mortgagor (*Sharp v. Rickards*, [1909] 1 Ch. 109).

**ART. CXXXVII.—*Reconveyance on Redemption.***

On redemption the mortgagor is entitled in equity to require the mortgagee to reconvey to him the mortgaged property and to return all the title-deeds. By sect. 15 of the Conveyancing Act, 1881, as amended by sect. 12 of the Conveyancing Act, 1882, instead of a reconveyance he, or in priority to him any incumbrancer, may require the mortgagee to reconvey to a third person. As between different incumbrancers, the requisition of the one who is prior in time prevails over the requisitions of the others.

Section 15 of the Conveyancing Act, 1881, was intended to facilitate the transfer of mortgages where the mortgagee wanted his debt repaid and the mortgagor was not himself in a position to repay it. The amendment by sect. 12 of the Conveyancing Act, 1882, was intended to preserve the right of subsequent mortgagees to have the legal estate preserved to them on the payment of the legal mortgage (see *per JESSEL, M.R.*, in *Teeven v. Smith* (1882), 20 Ch. D. 724, at p. 729). A strange application of this doctrine is to be found in the decision of the Court of Appeal in *Manks v. Whiteley*, [1912] 1 Ch. 735. There a second mortgagee was held to be entitled to priority over a subsequent mortgagee who had paid off the first mortgage and had had the legal estate conveyed to him before he received notice of the second mortgage. *Sed quere.* The case was decided on the authority of *Toulmin v. Steere* (1817), 3 Mer. 240, which held that when a first mortgagee reconveyed the mortgaged land to the mortgagor, the mortgage security became merged in the legal estate, and the mortgagor became a trustee of the latter for the benefit of a second mortgagee. How this doctrine could operate to give an equitable mortgagee priority over a subsequent legal mortgagee without notice is not very clear.

## CHAPTER IV.

## RIGHT TO FORECLOSE.

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**ART. CXXXVIII.—*Extent of the right to Foreclose.***

A mortgagee can foreclose the mortgagor's equity of redemption without redeeming mortgages (if any) prior, but not without foreclosing all mortgages subsequent, to his own.

This rule, taken in conjunction with the one stated in Art. CXXXII. (3), (4) (*supra*), is commonly summed up in the maxim "redeem up, foreclose down." Thus, say A. mortgages Blackacre first to B., then to C., then to D., and finally to E. If D. wishes to redeem B.'s mortgage he must also offer to redeem C.'s, though he can if he chooses redeem C.'s without redeeming B.'s. Again, if D. wishes to foreclose A.'s right of redemption, he must also foreclose E.'s right as mortgagee. He can, however, foreclose both A. and E. without redeeming B. or C. But he cannot redeem B. or C. without claiming to foreclose A. and E. The reason of the rule is that B. and C. are not interested in the foreclosure of A. and E. since their securities in any event take precedence of A.'s and E.'s interests. But A. and E. are interested in the redemption of B. or C. since the value of their security depends upon the state of accounts between B. and C. and the mortgagor, and so it is necessary in an action to redeem B. or

C. to have them before the court (*Teeran v. Smith* (1882), 20 Ch. D. 724. See Stra. Mortgages, pp. 134, 135).

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### ART. CXXXIX.—*Interest allowed on Foreclosure.*

After a decree *nisi* of foreclosure the mortgagor may redeem at any time within six months on payment of the mortgage debt and the same costs as in an action of redemption, and all interest on the mortgage debt which has accrued due during the six years preceding the decree. Where, however, the mortgaged property has been sold and the mortgagor applies for the surplus of the purchase money, the court, in ascertaining what is the surplus, will allow the mortgagee all arrears of interest.

The practice in foreclosure actions is to order an account to be taken as between the mortgagor and the mortgagee seeking foreclosure and all the subsequent mortgagees. The prior mortgagees are not made parties since they are not concerned with the rights of parties who take only after they are satisfied. When such accounts are taken they are similar in all ways to those taken in a redemption action (see Art. CXXIV. (ii), *supra*), except that the court allows the mortgagee only six years' arrears of interest. This limitation is based on the consideration that the mortgagee is seeking to recover arrears of interest, and is therefore within sect. 42 of the Real Property Limitation Act, 1833 (see *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385). When the chief clerk has certified the amount of debt, interest, and costs owing by the mortgagor to the mortgagee, he adds six months' further interest to that amount, and an order is made that the mortgagor and the subsequent mortgagees shall redeem within the six months following the order, or be for ever foreclosed of their right to redeem. The defendants then have six months to redeem, but they are bound to pay the whole six months' extra

interest, however soon after the order they or any of them may redeem (*Hill v. Rowlands*, [1897] 2 Ch. 361).

It is customary now where there are several puisne mortgagees to limit one period for all of them to redeem, unless one of them asks for further time. A further time will not be allowed to the mortgagor (*Platt v. Mendel* (1884), 27 Ch. D. 246).

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#### ART. CXL.—*Jurisdiction of the Court to Order a Sale.*

In any action for foreclosure, redemption or sale, or for raising the mortgage money in any other way, the court may, if it thinks fit, at the request of any one interested in the mortgage money or in the equity of redemption, and notwithstanding the objection of any other such person, order a sale, without allowing time for redemption, on such terms as it thinks fit.

This power of the court to order a sale is given by sect. 25 (2) of the Conveyancing Act, 1881. It is to be distinguished from the right of a plaintiff in a redemption action to require a sale instead of an order for redemption (see Art. CXXXII. (5), *supra*). The latter confers a right to a sale on the plaintiff. This sub-section confers a discretion upon the court to order a sale if it thinks fit. The distinction is similar to that arising under the Partition Acts, 1868 and 1876, in actions for partition of land held in joint tenancy (see *Stra. Property*, p. 132).

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ART. CXLI.—*When Foreclosure is Complete.*

A foreclosure becomes complete—

- (i) In a foreclosure action by an order of the court making a decree *nisi* for foreclosure absolute;
  - (ii) In a redemption action as against the person seeking redemption by an order of the court dismissing the action for any other cause than want of prosecution.
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## CHAPTER V.

## EQUITABLE LIENS.

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ART. CXLII.—*Nature of an Equitable Lien.*

(1) An equitable lien is a right in equity residing in one person to have a claim satisfied out of property belonging to another.

(2) It differs from a mortgage in this, that it does not transfer to the person having it any title at law or in equity to the property, and therefore it cannot be enforced by foreclosure.

(3) It differs from a common law lien in this, that it does not depend for its continuance on the person having it retaining possession of the property, but affects everybody taking the property with notice of it, and is not a mere right of retention until the claim is satisfied, but entitles the person having it to obtain satisfaction of his claim by means of a judicial sale of the property.

## PARAGRAPH (1).

Most equitable liens arise by operation of equity. We have already had occasion to refer to several of these,

*e.x. gr.*, the lien which a trustee has upon the trust estate for costs and expenses properly incurred by him in discharging the trust (*supra*, Art. LVIII.). Where the lien arises by express contract, it is called usually not a lien but a charge. However, for all practical purposes, a lien and a charge are identical.

#### PARAGRAPH (2).

As we have seen, a mortgage transfers the mortgagor's title to the mortgagee, and on the mortgagor's failure to redeem the mortgagee's title becomes absolute in law. Foreclosure is simply the withdrawal of the bar to forfeiture which equity imposes. It in itself never transfers title, and, therefore, where the title has not been otherwise transferred, it can have no application (*supra*, Art. CXXI.).

#### PARAGRAPH (3).

For the law as to common law liens, see Stra. Property, pp. 341, 342.

It is enough here to point out that at common law a lien is simply the right to retain another person's property until he pays a claim against him, and that such lien is lost the moment the person having it parts with the possession of the property subject to it. Any right to sell to satisfy the lien—which now occurs sometimes—must be given expressly by statute (see, for instance, the Innkeepers Act, 1878).

In equity, on the other hand, “the owner of an equitable charge or lien on property as a security for money which is due and payable, has a right to a judicial sale of that property to satisfy the charge or lien” (*per* KEKEWICH, J., in *Gorringe v. Irwell India Rubber Works* (1886), 34 Ch. D. 128, at p. 134; and see *per* Lord COTTONHAM, L.C., in *Neate v. Duke of Marlborough* (1838), 3 My. & Cr. 407, at p. 417).

Moreover, like every other equity, it binds every person receiving the property even for value if such person had

notice at the time he received the property of the lien (*Whitbread and Company v. Watt*, [1901] 1 Ch. 911; affirmed, [1902] 1 Ch. 835: cited *infra*, p. 355).

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#### ART. CXLIII.—*Vendors' and Purchasers' Liens.*

(1) An owner of property who has entered into a binding contract for the sale of it has a lien on such property for the unpaid purchase-money from the time at which such sale should have been completed until such purchase-money is paid.

(2) A person who has entered into a binding contract for the purchase of property, and in pursuance of such contract has paid before conveyance part or all of the purchase-money, has a lien on such property for the purchase-money so paid until the property is conveyed to him.

(3) Where such contract is not completed, if the failure to complete is due to the default of the person having the lien, the lien is defeated; if it is due to the default of the other party, it can be enforced by a sale.

(4) When the money secured by the lien is not paid when it should be paid, the court will allow interest upon it at the rate of 4 per cent. per annum.

(5) The above rules apply only when there is nothing in the contract or in the circumstances surrounding the contract to show that they were not intended to apply.

## PARAGRAPH (1).

It is commonly said that a vendor's lien for unpaid purchase-money arises upon the conveyance of the property before the whole purchase-money is paid. This is not accurate. It arises as soon as the purchase-money should be paid, *i.e.*, at the time fixed for completion (*Kettlewell v. Watson* (1884), 26 Ch. D. 501). If after such time the vendor seeks to enforce the contract, he always asks the court to declare that he has a lien for the purchase-money on the land contracted to be sold, and, on this lien being declared, he can ask for a sale and hold the original purchaser responsible for any loss which may occur on such sale.

Formerly, upon a conveyance of land, if the whole purchase-money was not then paid, it was customary to insert a receipt in the body of the conveyance, but not to indorse it on the deed. Accordingly, if there were no indorsed receipt, this was held to give any subsequent purchaser notice that the property was affected by a vendor's lien (*Wilson v. Keating* (1859), 27 Beav. 121). This rule has now been abolished by sect. 54 of the Conveyancing Act, 1881, which makes a receipt in the body of the conveyance sufficient for all purposes.

A vendor's lien is now an incumbrance within Locke King's Act (see *infra*, Art. CCXVIII., and note on para. 1 (i)).

It is to be noted that the law as to a vendor's and also a purchaser's lien applies equally to realty and personalty (*Davies v. Thomas*, [1900] 1 Ch. 435; *In re Stucley v. Kekewich*, [1906] 1 Ch. 67).

## PARAGRAPH (2).

This right is simply the counterpart of the vendor's lien. It is customary on entering into a contract for the purchase of property for the purchaser to pay a deposit of about 10 per cent. of the purchase-money as an earnest. This deposit creates a lien till the contract is completed by

conveyance, or the deposit is repaid or the lien defeated under the next rule.

The usual cause for the enforcement of this lien is the failure of the vendor to make a good title to the property he has contracted to sell. Here, as in every case, save where the contract goes off through the purchaser's default, the purchaser can recover his deposit (*Rose v. Watson* (1864), 1 H. L. C. 672).

### PARAGRAPH (3).

The rule here stated is but a completion of those stated in the two preceding paragraphs. The vendor and purchaser have their respective liens unless the contract goes off through their respective defaults. If it goes off through the default of either his lien is gone. Thus, in *Ridout v. Fowler*, [1904] 2 Ch. 93, A. contracted to purchase land from B., and having paid a deposit, was let into possession. When the time for completion arrived A. failed to complete. Subsequently C., to whom A. was indebted, appointed a receiver of A.'s interest in the land. B. commenced an action of ejectment against A., which was settled by A. giving up possession on B.'s paying him a certain sum of money:—*Held*, that A.'s lien on the land had been lost by his default in failing to complete, and that C. had no remedy either against the land or against B.

A contract does not go off through the purchaser's default within this rule when it is rescinded by the vendor under an express power which could not be exercised if the purchaser had faithfully carried out his obligations. Thus, in *Whitbread and Company v. Watt*, [1902] 1 Ch. 835, A. entered into a contract to purchase land from B., and paid a deposit of £200. By the terms of the contract A. was to erect three hundred houses within two years, and on the erection of such houses B. was to convey the land to A., and if A. failed so to erect these houses, B. could rescind the contract. A. did fail to erect them and B.'s assign rescinded:—*Held*, that A. had a lien on the land for the £200 deposit.

## PARAGRAPH (4).

See *Re Draar, Savile v. Draar*, [1903] 1 Ch. 781.

## PARAGRAPH (5).

Sometimes the purchaser's lien for his deposit is expressly excluded by the contract, and very often his right to interest is excluded in the same way, unless the contract goes off through the vendor's wilful default.

The vendor's lien is more often excluded by the circumstances of the contract showing that no such lien was intended. Thus, if he accepts a valuable security for the purchase-money, or if the consideration is not the payment of a lump sum but is an annuity not charged on the land, the court will hold no lien was intended (*Dixon v. Gayfere* (1857), 21 Beav. 118).

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ART. CXLIV.—*Subrogation.*

Where a debtor has a right to indemnity against a third person, equity will permit the creditor to stand in the shoes of the debtor and take advantage of all remedies he is entitled to against such third person. This is what is called the doctrine of *subrogation*.

The most common example of subrogation occurs in the case of an executor carrying on the business of his testator. When this happens the executor is liable personally to the trade creditors for the debts he contracts in carrying on the business. If, however, he is acting in carrying it on in accordance with the testator's will, he is entitled to an indemnity against these trade debts from the estate of the testator. And where the business is carried on with the consent of the testator's creditors, this indemnity takes

precedence of the claims of such creditors (*Dowse v. Gorton*, [1891] A. C. 190). The trade creditors may proceed personally against the executor, but they may also claim the advantage of his indemnity and proceed directly against the testator's estate (*Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342). If they proceed against the estate they can recover only what he was entitled to recover. Thus, where a receiver of a company had incurred trade debts to the extent of £900 and had received on behalf of the company £400 which he had not accounted for, it was held that the trade creditors could subrogate only to the extent of £500 (*In re British Power Traction and Lighting Company, Limited*, [1910] 2 Ch. 470).

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#### ART. CXLV.—*Assignment of After-acquired Property.*

A contract for valuable consideration to transfer property which at the time of contracting does not belong to the person agreeing to transfer it, will, on such person becoming entitled to such property, be enforced in equity as if the contract were a declaration of trust.

“A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment” (*per JESSEL, M.R., Collyer v. Isaacs* (1881), 19 Ch. D. 342, at p. 351; and see *Tailby v. Official Receiver* (1888), 13 App. Cas. 523).

The most usual example of the assignment of property in which the assignor has no interest at the date of assignment is the covenant to assign after-acquired property,

which is usually inserted in a woman's marriage settlement. A husband seldom covenants to settle his after-acquired property ; but when he does so two points should be noted. In the first place, where the covenant is to assign or settle specific property, then in case of the bankruptcy of the settlor before actual assignment the covenant is void (Bankruptcy Act, 1883, sect. 47). In the second place, such a covenant is not void as a fraud upon his creditors within 13 Eliz. c. 5, in the absence of evidence of actual fraud (*In re Reis, Ex parte Clough*, [1904] 2 K. B. 769).

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### SECTION III.—MARRIED WOMEN'S AND INFANTS' PROPERTY.

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#### *ART. CXLVI.—Trusts for the Benefit of Women.*

(1) A trust for the benefit of a woman, whether married or unmarried, is now governed in general by the ordinary law applicable to private trusts subject to the following qualification :

(2) A condition in the trust instrument restraining her from alienating the trust property or anticipating the income of it so long as she is married is good.

(3) Such a condition may be imposed before or during coverture and may be restricted to a particular coverture or be general in its terms. Where it is restricted to a particular coverture it becomes void on the determination of such coverture ; but where it is general in its terms, on the determination of a particular coverture it becomes dormant only and will revive on her re-marriage, unless in the meantime she by alienating the trust property or in some other way avoids it.

#### PARAGRAPH (1).

In Art. X. (*supra*) it was pointed out that the old common law incapacity of a married woman to hold

property apart from her husband is not recognised in equity. This equitable doctrine has now been adopted by the Legislature, which, by the Married Women's Property Acts, 1882 to 1893, conferred on a married woman a legal capacity to hold all kinds of property and to contract in respect of it as if she were a feme sole. In spite of this enactment the property of women is still usually held in trust for them. This is for the purpose of securing for them, when married, the benefit of a restraint upon anticipation, though, where the property is realty, a trust is no longer strictly necessary (*Re Lumley, Ex parte Hood-Barris*, [1896] 2 Ch. 690). With the exception, then, of the equitable doctrines of restraint and a wife's equity to a settlement (see *infra*, Art. CXLVIII.), married women's property seems not a proper subject for detailed discussion in a treatise on equity, but rather matter for the law of property generally (see Stra. *Property*, pp. 371—373, 375—378).

As, however, the law applicable now to married women's legal property is based upon the equitable rules once in force only in Chancery, it is desirable to trace very shortly the origin and development of that law. The foundation of the whole system was what was called the *separate use*. If property were given by any one—including the husband—to a married woman and the donor directed expressly that it should be enjoyed by her independent of her husband, or if before marriage husband and wife agreed that after marriage her own property should be so enjoyed, equity insisted that the direction or agreement should be observed. If trustees were appointed, it was their duty to see the married woman received herself the property and its profits, and if no trustees were appointed then, though the property vested in law in her husband, equity constituted him a trustee of it for the same purpose. Having once established thus the capacity of a married woman to hold property in equity, equity proceeded slowly to apply the maxim "equity follows the law." It held that she could sell it, leave it by her will, or contract so as to bind it. A married woman, however, was presumed both in equity and law to contract as her husband's agent, and her debts accordingly could be satisfied out of her separate estate only when she contracted in respect

to it (*Pike v. Fitzgibbon* (1881), 17 Ch. D. 454). And the separate use was established to protect the wife during the coverture against her husband. Accordingly, when she died during coverture, in so far as she had not disposed of her property during her life or by her will, her husband's common law rights revived. That is, he was entitled to her personality as her administrator and, if he had issue by her capable of inheriting, to an estate for his life by the courtesy in her heritable freeholds.

This was the state of the law as to trusts for married women's benefit when the Married Women's Property Act, 1882, was passed. The short effect of that statute was to declare to be statutory separate estate all the unsettled property of a woman married after December 31st, 1882, and all the unsettled property the title to which accrued after that date to a woman married before it (see *In re Bacon, Toovey v. Bacon*, [1907] 1 Ch. 475). The same incidents were attached by the Act to such statutory separate estate as equity had attached to the equitable separate estate.

One or two alterations were made affecting all separate property indirectly. Thus a married woman trading separately from her husband may be made bankrupt (sect. 1 (5)), and whether trading separately or not she can be made liable for damages and costs in an action on contract or in tort (sect. 1 (2)). But the remedies of her creditors are still limited to her separate property: they have no remedy against her personally (*Scott v. Morley* (1887), 20 Q. B. D. 120). And by sect. 1 of the Married Women's Property Act, 1893, a married woman, when contracting otherwise than as agent, is to be deemed to contract in respect of her separate estate, whether she then has any or not, and her contract is to bind all separate property which she then or afterwards has and is to be enforceable against all property which she may afterwards, while discovert, be possessed of or entitled to. By a proviso, however, nothing in sect. 1 is to render available to satisfy any liability arising out of any such contract any separate property which at that time or thereafter she is restrained from anticipating (see *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66). By sect. 3 a married

woman's will made during coverture is to speak from the death of the testatrix without any republication after her husband's death, *i.e.*, it now carries not merely what was her separate estate during coverture, but all additions to it made during her widowhood. Finally, by sect. 4 of the Married Women's Property Act, 1882, the execution of a general power of appointment by will by a married woman has the effect of making the property appointed on her death assets for the payment of her debts (see *infra*, Art. CXCI.).

#### PARAGRAPHS (2) AND (3).

Both at law and in equity a condition restraining a man from alienating his property is void. The only way in which this object can be indirectly secured is by a condition determining his interest in the property on his attempting to alienate it. And such a condition is void if attached to an absolute interest or if introduced by a settlor in settling his own property on himself.

But both in equity and now at law a condition restraining a woman from alienating her property during coverture is good. And it may be attached to the income merely or to the absolute interest, and may be introduced where the settlor is settling her own property on herself.

The *clause against anticipation*, as this condition is usually called, was invented by Lord THURLOW, C., for the purpose of protecting the wife's property, in the words of Lord BROUGHAM, from the kicks or kisses of her husband.

By sect. 19 of the Married Women's Property Act, 1882, nothing in that Act is to interfere with or render inoperative any restraint on anticipation ; but no restraint introduced into a settlement of a woman's own property upon herself is to have any validity as regards debts contracted by her before marriage.

As the restraint is for the purpose of protecting the wife's property from the husband it only operates while she has a husband. The moment he dies or ceases to be

her husband her absolute right to do what she will with her property revives (*Tullett v. Armstrong* (1838), 1 Beav. 1). In the same way, it ceases, as far as income is concerned, the moment the income becomes payable to her, even though it has not then reached her hands. From that moment she becomes absolute owner of the income accrued due (*Hood-Barrs v. Heriot*, [1896] A. C. 174).

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#### ART. CXLVII.—*The Restraint on Anticipation.*

Where a married woman's property is subject to a restraint upon anticipation, the following rules apply :

(1) Where a judgment is obtained against her during coverture, the corpus and the future income cannot be taken to satisfy the judgment debt, unless the settlement imposing the restraint was of her own property and the debt for which judgment is recovered was contracted by her before marriage.

(2) Where she is made bankrupt her separate estate vests in her trustee in bankruptcy, but during coverture the income remains payable to her.

(3) During coverture the court may remove the restraint—

(i) For her own benefit, and with her consent, where it is shown to be for her benefit that it should be removed.

(ii) For the purpose of indemnifying her trustee in respect of liability for a

breach of trust where the trustee committed such breach at her instigation or request or with her consent in writing.

- (iii) For the purpose of paying the costs of an action or proceeding instituted by her or her next friend on her behalf.

The restraint on anticipation was invented to protect the married woman's separate property against her husband. To accomplish this purpose it was necessary to protect it against herself, her creditors also, and indeed all others having claims against her (see *Lady Buteman v. Faber*, [1898] 1 Ch. 144). This absolute immunity was formerly given by the Court of Chancery, but, as the above Article shows, it has now to some extent been modified by statute.

#### PARAGRAPH (1).

In the first place it should be remembered that as far as income is concerned, that is protected by the restraint only so long as it is subject to it. This subjection ends the moment an instalment of income becomes immediately payable to the married woman (*supra*, p. 363). It is then her separate property, with which she may deal as she likes. Accordingly, like other unprotected separate property, it is liable for judgments recovered against her while it remains her separate property—that is, while her trustees hold it for her or while it remains in her hands unspent (*Hood-Barris v. Heriot*, [1896] A. C. 174, and see *Sprange v. Lee*, [1908] 1 Ch. 424, where a very curious and questionable application of this principle is made). But it is not liable for judgments recovered against her before it accrued due to her, i.e., a judgment creditor cannot claim satisfaction of his debt out of the future income of the protected estate (*Whiteley v. Edwards*, [1896] 2 Q. B. 48; *Bolitho and Company v. Gidley*, [1905] A. C. 98).

As regards the corpus of the separate estate subject to restraint the married woman cannot incur during coverture

any legal obligation with regard to that, subject to the exceptions contained in the second and third paragraphs of the above Article. Accordingly, if by the death of her husband during coverture such restraint ceases, it cannot then be taken in execution of a judgment founded on any contract or tort of the married woman during coverture (*Brown v. Dimbleby*, [1904] 1 K. B. 28).

It has been pointed out (*supra*, p. 362) that a single woman who incurs debts is not permitted to defraud her creditors by means of a settlement on a subsequent marriage. Her liability continues after her marriage as before, notwithstanding any clause against anticipation contained in her settlement, as far as the property contained in that settlement is her own. If it is property settled upon her on or after the marriage by some one else—as, for example, her husband—the restraint is perfectly effectual as regards ante-nuptial as well as post-nuptial debts (*Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35).

#### PARAGRAPH (2).

Originally a married woman could not be made bankrupt. This was an inevitable corollary from the common law doctrine that she could not enjoy property or incur a legal obligation apart from her husband. When equity conferred the right to hold property and incur legal obligations on her own behalf, her immunity from the law of bankruptcy continued. For an attempt to create an “equitable” bankruptcy see *Robinson v. Pickering* (1881), 16 Ch. D. 660. Now, by sect. 1 (5) of the Married Women's Property Act, 1882, she may be made bankrupt, but only under one state of circumstances—when she is carrying on a trade separately from her husband. Where such condition is not fulfilled she cannot be made bankrupt, even if she committed an act of bankruptcy before her marriage (*Re A Debtor*, [1898] 2 Q. B. 576).

The effect of her becoming bankrupt seems to be that her separate estate, whether free or subject to a restraint on anticipation, vests in her trustee in bankruptcy. The free separate estate vests absolutely. The protected

separate estate vests subject to the restraint, that is, as long as her husband lives she continues, in spite of the bankruptcy, entitled to the income of it for her own use. On her husband's or her own death, the trustee holds it free from the restraint (*Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717; Stra. Lead. Cas. 227). Whether this is consistent with the proviso of sect. 1, Married Women's Property Act, 1893, which gives the protected separate estate immunity against any liability arising out of a contract, *quare.*

#### PARAGRAPH (3).

(i) This power was given by sect. 39 of the Conveyancing Act, 1881. That section is now repealed by sect. 7 of the Conveyancing Act, 1911, which gives the court power with her consent to bind, by judgment or order, a married woman's interest in property which is subject to a restraint upon anticipation or which by law she is unable to dispose of or bind, including a reversionary interest arising under her marriage settlement. The benefit which will justify the court in lifting the restraint must be a personal benefit to the wife, though not necessarily a pecuniary one (*Paget v. Paget*, [1898] 1 Ch. 47). What is such a benefit is, in each case, a question of fact (see *Re Pollard's Settlement*, [1896] 1 Ch. 901; *Re Blundell*, [1901] 2 Ch. 221).

(ii) This is the effect of s. 45 of the Trustee Act, 1893.

(iii) This is the effect of s. 2 of the Married Women's Property Act, 1893. Where the married woman is the defendant in an action, an appeal or other step in such action is not (*Hood-Barris v. Heriot*, [1897] A. C. 177), while a counterclaim is (*Hood-Barris v. Cathcart*, [1895] 1 Q. B. 873), a proceeding instituted by her within this rule. And see *Huntley (Marchioness) v. Gaskell*, [1905] 2 Ch. 656.

Where the married woman does institute the proceeding, the onus of showing that the costs should not be paid out

of her separate estate lies on her (*Pawley v. Pawley*, [1905] 1 Ch. 593).

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#### ART. CXLVIII.—*Wife's Equity to a Settlement.*

Where an interest in possession in property accrues to a husband in right of his wife, and to obtain such property a claim has to be made which comes within the exclusive or concurrent jurisdiction of equity, the court in which such claim is heard will make it a condition of aiding the claimant to obtain the property that a settlement of such property or such part of it as the court thinks fit shall be made for the benefit of the wife and her children. The equity is called the *wife's equity to a settlement*.

The equity was good whether the claimant was the husband himself or his assignee for value or trustee in bankruptcy.

The wife's equity to a settlement was an invention of the Court of Chancery to mitigate, where it was within its power so to do, the legal doctrine as to the rights which marriage formerly gave a husband as to his wife's property. Marriage, since the Married Women's Property Act, 1882, gives a husband no such right at any rate during his wife's life. The doctrine, therefore, now applies only to property the title to which accrued before January 1st, 1883, to a woman married before that date. Naturally it has ceased to be of much practical importance.

It will, therefore, be sufficient to say that it extends to equitable interests in possession in land which the husband takes absolutely, whether such interests are equitable because the land is held in trust or because it is subject to a legal mortgage (*Sturgis v. Champneys* (1839), 5 My. & Cr. 97), and to equitable choses in action, legacies, etc. It

does not, however, extend to mere life interests taken by the husband in right of the wife, as where the fee-simple of land descends to the wife. As long, at any rate, as the husband is supporting her, she has no equity to a settlement out of such life estates (*Taunton v. Morris* (1879), 11 Ch. D. 779).

The equity is personal to the wife, who may abandon it even after judgment in her favour (*Murray v. Lord Elibank* (1804), 10 Ves. 84; (1806), 13 Ves. 1); and the wife may claim as plaintiff or the trustees may claim on her behalf (*Lady Elibank v. Montolieu* (1801), 5 Ves. 737). And see as to frauds on marital rights, *supra*, Art. CXIV.

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#### ART. CXLIX.—*Mortgages of Married Women's Property.*

Where a husband and wife join in mortgaging the wife's property and the mortgage money is shown by the mortgage deed to have been paid to the husband (or before 1883 to the husband and wife), then the court presumes that the mortgage debt was the husband's debt and the wife's property was merely security for it, unless it can be shown that this was not in fact intended.

This rule was first based on a dictum of WOOD, V.-C., in *Hudson v. Carmichael* (1854), Kay, 613, at p. 620. It was generally thought to have been displaced by the comments of LINDLEY, M.R., in *Paget v. Paget*, [1898] 1 Ch. 474, 475; but in the recent case of *Hall v. Hall*, [1911] 1 Ch. 487, it was adopted and applied by WARRINGTON, J.

The presumption may be rebutted by showing, for instance, that in fact a gift by the wife was intended, or that the money was in fact applied for her use.

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ART. CL.—*Infants' Property.*

(1) The father is the natural guardian of his infant legitimate children, and where no trustees are appointed to their property he is entitled to receive the income of it during the infants' minority. He is also entitled to appoint by deed even if he is a minor, or by will if he is over age, guardians to act after his death. Such guardians are called *testamentary* guardians. The mother of illegitimate infant children is their *natural* guardian, and the mother of legitimate infant children is now, if she survives the father, a *statutory* guardian jointly with the testamentary guardian (if any); and if the father is unfitted to be sole guardian of infant children then the mother, if she predeceases him, may by will or deed provisionally appoint for the court's approval a guardian to act with the father.

(2) As representing the King, who is *parens patriæ*, the Chancery Division has jurisdiction over infants and their property, and can make orders for the removal of natural, testamentary or statutory guardians, for the maintenance and upbringing of infants and for the confirmation of contracts by and sales of the property of infants where it is for the benefit of the infants that such orders should be made; and where infants are entitled to property it can itself assume a guardianship over them by making them wards of court.

(3) Where the property is vested in trustees in trust for an infant for life or for any greater interest, and whether absolutely or contingently on his attaining twenty-one years, or on the

occurrence of any event before his attaining that age, then if the income of the trust property till the infant attains twenty-one years is not otherwise disposed of, the trustees, unless a contrary intention appears, may in their discretion allow the father or guardian, or otherwise apply, so much of it as they may think proper for the benefit of the infant, and must accumulate the balance of the income for the person ultimately entitled to the trust property.

#### PARAGRAPH (1).

This is a summary of the law as enacted by 12 Car. 2, c. 24, and 49 & 50 Vict. c. 27.

Where there are no trustees of an infant's property the father or guardian takes no estate in it; but he is by ss. 8 and 9 of 12 Car. 2, c. 24, entitled to receive on the infant's behalf the rents and profits of it. If it is desirable to sell the infant's property, a provisional contract must be submitted for the approval of the court. The order permitting the sale usually provides that the nature of the property is not to be changed in case the infant dies before attaining twenty-one. In the absence, however, of such a provision the property becomes converted from the time the order is made (*In re Searle, Ryder v. Bird*, [1912] 2 Ch. 365, and *supra*, Art. LXXXVIII.).

#### PARAGRAPH (2).

The court has full jurisdiction over infants whether the father is living or not; but it will not remove him from their guardianship except on a strong case being made for such removal (*In re Besant*, 11 Ch. D. 508. As to incest, see 8 Edw. 7, c. 45, s. 1). This jurisdiction has come to the Chancery Division from the former Court of Wards. The Court of Probate also has power to make

orders as to the custody of infants during their minority (*Thomasset v. Thomasset*, [1894] P. 295).

Any person is entitled to apply to the court as next friend to the infant. Such person is responsible for the costs of the proceedings, but is entitled to an indemnity out of the infant's property in case the proceedings were clearly initiated and carried on for the infant's benefit (*Steeden v. Walden*, [1910] 2 Ch. 393). Any such proceedings have the effect of making the infant a ward of court. Once an infant has been made a ward of court all dealings with his property and person are subject to the sanction of the court, though in general the court will enforce the wishes of the infant's natural or testamentary guardian where such wishes are reasonable. Any unauthorised dealings with the infant—such as marriage—amount to contempt of court, even where the person having the dealings was not aware that the infant was a ward of court. In consequence of this it has become customary for a parent or guardian, who wishes to prevent an undesirable marriage, to pay some money into court in trust for the infant and commence an action for the administration of the trust (see *In re H.'s Settlement, H. v. H.*, [1909] 2 Ch. 260).

The father, being under a legal obligation to maintain and educate his children, the court will not allow him part of the income of the child's property for this purpose where it is shown that he is in a position to fulfil the obligation without such assistance. But in deciding whether he is in such a position the court will not take into consideration the fortune of his wife and will take into consideration not merely the income of the father but the prospects and fortune of the child.

It appears clear that the court cannot mortgage or charge the corpus of an estate tail vested in an infant for the maintenance of the infant; but it can charge a fee simple at any rate for the payment of past maintenance on the ground that if the person providing the infant with maintenance had sued him for it as a necessary, judgment binding the fee simple would have been recovered (*In re Hambrough's Estate*, [1909] 2 Ch. 620).

## PARAGRAPH (3).

This is shortly the effect of sect. 43 of the Conveyancing Act, 1881. By sect. 42 of the same Act, as modified by sect. 14 of the Conveyancing Act, 1911, powers are given to trustees to deal with an infant's settled land.

Two points may be noted. The trustees have an absolute discretion to apply so much as they think proper of the income for the benefit of the child, even though the child's father is living and able to maintain and educate it without help; but they are not justified in paying over the income to the father or guardian without making any inquiries to see whether the child is being properly maintained and educated (*In re Bryant*, [1894] 1 Ch. 324).

In the second place the person entitled to the accumulated income where there is no express gift of it to the infant is the person ultimately entitled to the corpus of the trust property (*In re Bowley*, [1904] 2 Ch. 685).

As to what amounts to a contrary intention, see *In re Cooper*, *Cooper v. Cooper*, [1913] 1 Ch. 350.

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ART. CLI.—*Infants' Assurances and Contracts.*

An infant on coming of age can then or within any reasonable time afterwards affirm or repudiate any disposition of his property, or any contract made by him during his infancy, subject to the following limitations :

- (1) A settlement of his or her property by an infant not less than twenty being a male, or not less than seventeen being a female, made on his or her marriage and approved by the court, is as valid as if the settlor had been of full age when the settlement was made.

- (2) A settlement not within the above rule made on marriage by the man of his intended wife's property, if she is an infant, may on her attaining full age be repudiated by her, but if she dies before attaining full age it will bind or pass any property of hers to which he may become entitled on her death and which he could otherwise have bound or disposed of.
- (3) A contract or disposition of property made by an infant for the purpose of providing himself with necessaries or for any other purpose which, in the opinion of the court, is for his benefit, cannot be repudiated by him on attaining full age.
- (4) A contract with an infant for money lent or goods supplied where such were not necessaries and an account stated are void and cannot be ratified by the infant on attaining full age so as to make them enforceable against him.
- (5) An infant who repudiates a settlement on attaining full age is liable to have any interest taken by him or her under it appropriated to make compensation for any benefits lost by the other parties to the settlement through such repudiation.

#### PARAGRAPH (1).

This is a short summary of the Infants Settlement Act, 1855.

## PARAGRAPH (2).

This is a short summary of sect. 2 of the Married Women's Property Act, 1907, which was passed for the purpose of getting rid of some decisions on the effect of sect. 19 of the Act of 1882.

## PARAGRAPH (3).

This depends upon the common law, and is merely a statement of the ordinary disability of an infant (see *Sir W. C. Levy and Company, Limited v. Andrews*, [1909] 1 Ch. 763, at p. 769, and *Roberts v. Gray* [1913] 1 K. B. 520).

## PARAGRAPH (4).

This is a summary of the Infants Relief Act, 1874.

## PARAGRAPH (5).

See Under, and Strahan's Inter. of Wills and Settlements, pp. 363 and 368.

## **BOOK III.**

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### **EQUITABLE REMEDIES.**



## BOOK III.

### EQUITABLE REMEDIES.

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#### SECTION I.—GENERAL PRINCIPLES OF EQUITABLE RELIEF.

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#### ART. CLII.—*Nature of Equitable Relief.*

Equitable relief is afforded by means of the enforcement of rights, the recognition of estates or interests, or the application of remedies, which were formerly enforceable, recognisable, or available only in courts of equity.

The enforcement of a trust, the earliest, and perhaps the most characteristic, branch of equity jurisdiction, involves the recognition of an estate or interest, and rights, in the cestui que trust, which, as we have seen, received no recognition whatever in the Courts of Common Law (*supra*, Art. I.).

The doctrines of the equity of redemption of a mortgagor (*supra*, Art. CXX.), the equitable lien of an unpaid vendor (*supra*, Art. CXLI.), and the equitable assignment of a chose in action (*supra*, Art. XI.), afford illustration of the recognition of equitable estates or interests in the

mortgagor, the vendor, and the assignee, which were unknown to the common law.

Again, the setting aside by a Court of Equity of a deed or transaction binding at law upon the ground of equitable fraud (*supra*, Art. CXIV.), or undue influence (*supra*, Art. CXV.), exemplifies equitable relief based upon the recognition of equitable rights in the person defrauded or unduly influenced. The rectification in equity of an instrument upon the ground of mistake is another instance of the same type. Equitable relief is also obtainable in cases of loss or accidental destruction of deeds and other documents by persons claiming estates or interests thereunder, and the payment or satisfaction of lost bonds or other instruments is enforceable in equity in cases in which a legal remedy would formerly have been unavailable or inadequate.

The enforcement of rights arising from the doctrines of equity relating to trusts, mortgages, equitable liens or charges, fraud, undue influence, accident, mistake, etc., may be regarded, therefore, as various modes of equitable relief. These have already been discussed in Books I. and II. of this work.

Equitable relief by means of the application of the peculiar remedies of equity, or those remedies which were formerly available only in Courts of Equity as distinguished from Courts of Law, is the subject-matter for consideration in the ensuing Articles.

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#### ART. CLIII.—*Principles upon which Relief is Granted.*

The granting of equitable relief is a matter of discretion. Such discretion is exercisable in accordance with judicial precedent, and is, moreover, regulated by the general principles embodied in the following maxims :

- (i) He who comes into equity must come with clean hands.

- (ii) He who seeks equity must do equity.
- (iii) Delay defeats equity.

The grant or refusal of equitable remedies is discretionary (*supra*, Art. III.). In this respect the Judicature Acts have in no way affected the distinction between legal and equitable remedies. The grant of a legal remedy is a matter of right; no discretion is vested in the court with regard to it. If a plaintiff can prove a breach of contract or a trespass by the defendant, he is entitled to judgment and the legal remedy of damages as of right, unless some equitable defence be available to the defendant. In a claim for specific performance of a contract for the sale of land, on the other hand, a decree for specific performance, being an equitable remedy, may be granted or refused at the discretion of the court.

The exercise of this discretion as to the granting of an equitable remedy, such as specific performance or an injunction, is, of course, based upon judicial precedent, but in its exercise matters may be, and are, taken into consideration which could not be considered in a mere action for damages. Thus the conduct of the parties, any *laches* or delay upon the part of the plaintiff in asserting his claim, or hardship resulting to the defendant, may afford a defence to an equitable claim, and a ground for refusal of the equitable remedy.

The principles upon which Courts of Equity have acted, and upon which, therefore, all courts must now act, in the granting or refusing of equitable remedies, have become formulated in the maxims stated above, which it will be convenient here to explain.

(i) *He who comes into equity must come with clean hands.* —The meaning of this maxim is that the claim of a suitor for equitable relief must be free from any taint of illegality or fraud. The existence of any illegal contract or act forming part of the cause of action would as a general rule disentitle the plaintiff to any equitable remedy.

For instance, if an infant by fraudulently concealing his age were to induce his trustees to pay over a sum to

him, and were subsequently to sue them for the amount so paid in breach of trust, his conduct would disentitle him to recover (see *Orereton v. Banister* (1844), 3 Hare, 503, at p. 506). The court will not enforce any obligations alleged to arise out of a contract or transaction which is illegal, and it is immaterial whether or not the defendant has pleaded the illegality as a defence (see *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214, at p. 220).

A transaction may be illegal so as to disentitle to relief if it be opposed to statute, or common law, or public policy, as, for example, agreements in total restraint of trade or marriage. There are numerous decisions as to various classes of acts which may contravene "public policy," a term which does not admit of exact definition, and which, moreover, is capable of extension so as to include transactions outside the present decisions (see *Egerton v. Brownlow* (1853), 4 H. L. C. 210, at p. 239; *Daries v. Davies* (1887), 36 Ch. D. 359, at p. 364). In *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351, an action for specific performance of an agreement for compromise of a prosecution for obstructing a public road was dismissed on the ground that the agreement was against public policy and illegal (see also *Consolidated Exploration and Finance Company v. Musgrave*, [1900] 1 Ch. 37).

A contract made abroad, though valid by the country where it was made, will be unenforceable in England as being contrary to public policy or the policy of English law when the contract is in conflict with what are deemed in England to be essential public or moral interests (see *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 K. B. 572). So where it was sought to enforce in the English courts a contract made in France, which the defendant had been induced to enter into by threats of a criminal prosecution against her husband in France, though the contract so induced was not invalid by the French law, the English courts, deeming it to be in contravention of an essential principle of justice and morality, refused to enforce it (*Kaufman v. Gerson*, [1904] 1 K. B. 591).

The above stated principles are, of course, of especial application when the party invoking the aid of the court

is himself implicated in the illegality. The plaintiff's knowledge of the illegality of the matter upon which his claim is based is not, however, as a general rule, material. If the illegality comes to the notice of the court, it will usually disentitle the party to equitable relief, though there are some exceptions to this rule.

In further illustration of the principle that a suitor in equity must come with clean hands, the rule may be cited that the court will not grant an injunction to restrain the infringement of a trade-mark which is fraudulent or misleading. "A trader may be guilty of such misrepresentations with respect to his goods as to amount to a fraud upon the public and to disentitle him on that ground as against a rival trader to the relief which he might otherwise claim" (see *Leather Cloth Company v. American Leather Company* (1865), 11 H. L. C. 523, at p. 542, *per* Lord KINGSDOWN). So also injunctions to restrain the infringement of copyright in works of a blasphemous, libellous, or immoral nature would be refused (see *Lawrence v. Smith* (1822), Jac. 471). Nor would an account be ordered to be taken of any illegal transaction.

In certain cases, contrary to the well-established doctrine, equitable relief may be obtained notwithstanding the claim being based upon an illegal act or contract; as where relief is claimed before the illegal purpose has been executed (see *Sykes v. Hughes* (1870), L. R. 9 Eq. 475) : on grounds of public policy ; or where an illegal contract was induced by undue influence of the defendant (see *Williams v. Bayley* (1866), L. R. 1 H. L. 200 ; see also *Kearley v. Thomson* (1890), 24 Q. B. D. 742).

(ii) *He who seeks equity must do equity.*—This maxim tersely expresses the principle enforced by the Court of Chancery that those who asked for its assistance were required as a condition of obtaining equitable relief to do justice as to the matters in respect of which that assistance was sought. "The rule decides in the abstract," to quote the words of WIGRAM, V.-C., that the court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights, if any, as he also may be

entitled to in respect of the subject-matter of the suit" (*Hanson v. Keating* (1844), 4 Hare, 1, at pp. 4, 5).

If, for example, a plaintiff seeks an account against a defendant, the court will require the plaintiff to do equity by submitting himself to an account in the same matter in which he asks an account. So in the case of a suit for specific performance the court will give the purchaser his conveyance provided he will fulfil his part of the contract by paying the purchase-money. The maxim is also illustrated by the cases in which the court imposes equitable terms upon a successful suitor, by requiring him to make allowances or payments to the defendant which were not recoverable at law. What is called the wife's equity to a settlement (see *supra*, Art. CXLVIII.) is one example of the application of this principle. Another is that a tenant-in-common seeking partition is required to make an allowance in respect of the benefit to his share due to repairs or improvements (see *In re Jones*, [1893] 2 Ch. 475). And as to the general principle, see *supra*, Art. IV.

The rule that "he who seeks equity must do equity" is limited to the matter in respect of which the assistance of the Court of Equity is asked. It does not extend so as to authorise the court to impose upon a plaintiff any terms relating to a matter independent of that in respect of which the relief is sought (see *Gibson v. Goldsmid* (1854), 3 Eq. Rep. 106).

(iii) *Delay defeats equity*.—Prompt action to enforce an equitable claim is regarded as an essential condition to equitable relief, or in other words unreasonable lapse of time in seeking an equitable remedy will operate as a bar to the right to relief.

Lapse of time will afford a defence to a legal claim only when the remedy has been barred by a Statute of Limitations. Equitable claims, on the other hand, may be barred not only by Statutes of Limitations which apply to them directly, or which in some cases are applied by analogy (see *In re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502), but also by the *laches* or unreasonable

delay of the plaintiff in seeking equitable relief. This is the meaning of the maxim *Vigilantibus non dormientibus aequitas subvenit.*

The application of this equitable doctrine may be well illustrated in the words of LINDLEY, L.J.: “When a Court of Equity is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words, when equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences may have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it” (see *Knight v. Simmonds*, [1896] 2 Ch. 294, at p. 297).

In *Blake v. Gale* (1886), 32 Ch. D. 571, it was held by the Court of Appeal that the equitable right of a mortgagee of real estate, in the event of the security proving insufficient, to follow the assets into the hands of the residuary legatees of the mortgagor, amongst whom his personal estate had been distributed, might be, and in the particular case was, barred by lapse of time and acquiescence on the part of the mortgagee. BOWEN, L.J., in his judgment, pointed out that the question for decision was whether a Court of Equity under the circumstances would give the mortgagee recourse to parties against whom he had no claim at law. “When we find that a long time has elapsed during which the right has never been insisted upon, and when neither the Statute of Limitations applies, nor can the analogy of the statute be invoked according to the well-known way in which Courts of Equity occasionally invoke it, what have we to do? We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn the claim will, for the purpose of quieting possession, be

treated as abandoned" (*ibid.*, at p. 581). But mere delay in such a case where no such inference as this can be drawn will not in itself prevent the mortgagee following the assets. Thus in *In re Eustace*, [1912] 1 Ch. 561, a mortgagor after assigning his equity of redemption, of which assignment the mortgagee received notice, died. Interest was duly paid by the assignee for thirteen years when he made default. The mortgagee realised his security which proved insufficient:—*Held*, he was entitled to follow the deceased mortgagor's estate.

Though mere delay, in asserting an equitable right, may defeat the right of a plaintiff to relief when he has merely an *executory* interest to enforce, such as a trust to be established, or an *executory* contract to be specifically enforced, yet when a plaintiff has a vested right or is in actual possession of property, and seeks to enforce an *executed* interest, mere *laches* will not of itself deprive the party of equitable relief; nevertheless, in such case he may by "standing by" waive or abandon his right, so that it would not be enforced by a Court of Equity (see *Clarke and Chapman v. Hart* (1858), 6 H. L. C. 633, at pp. 647, 655; *Archibald v. Scully* (1861), 9 H. L. C. 360, at p. 383). The doctrine of *laches* in Courts of Equity is not, it has been said, an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material (see *Lindsay Petroleum Company v. Hurd* (1874), L. R. 5 P. C. 221, at pp. 239, 240).

Thus, for example, where a purchaser seeks to set aside or rescind a contract induced by fraud, he must apply for relief with reasonable diligence, and where owing to delay on his part other parties have acquired rights or the property has deteriorated in value or changed in condition the court will refuse rescission (see *Directors of Central Railway Company of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99, at pp. 125, 126).

In cases of concealed fraud where the plaintiff has not discovered the existence of the fraud and has not had reasonable means of discovering it, lapse of time will not bar his right to relief, and where there is a statutory limitation the period will commence to run only after discovery of the fraud (see *Bulli Coal Mining Company v. Osborne*, [1899] A. C. 351).

As to how far trustees can avail themselves of the benefit of Statutes of Limitations in defence to claims in respect of the trust property by the beneficiaries, see *ante*, Art. LXXI.

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#### **ART. CLIV.—*Equitable Remedies in aid of Law.***

Equitable remedies in protection of legal rights, which were formerly available only in courts of equity, and which are still within the peculiar province of the equity jurisdiction, are of the following kinds :

- (i) Specific performance of contracts.
- (ii) Injunctions.
- (iii) Accounts.
- (iv) Receivers.
- (v) Administration of assets.

These five classes of equitable relief, forming as they do important branches of equity jurisdiction at the present time, require special discussion in this part of the work.

In addition to these, however, there were several other kinds of equitable remedies which were formerly obtainable under the concurrent or auxiliary jurisdictions of the Court of Chancery, and which are, under the present system, obtainable in any Division of the High Court. The rectification

of contracts on the ground of mistake and the rescission or setting aside of deeds or other instruments for fraud, undue influence, etc., have already received consideration in the discussion of "Mistake," "Fraud," and "Undue Influence." Other equitable remedies were "Set-Off," *i.e.*, the equitable defence of setting up a countervailing claim to that of the plaintiff ; Interpleader, a proceeding by a person in possession of property in which he claims no interest for the determination of the rights of adverse claimants ; Discovery of facts or documents in the course of an action ; Bills for the perpetuation of testimony ; Bills to take evidences *de bene esse*, in the case of witnesses in ill-health, resident abroad, or too old or infirm to appear before the court ; Bills *quia timet*, for relief in case of apprehended injuries ; Bills of peace to establish in favour of or against a number or class of individuals some right which there was reason for supposing might be subsequently claimed or disputed, the object being to prevent multiplicity of suits. Actions in the nature of Bills *quia timet* and Bills of peace are still maintainable. Most of these remedies were originally obtainable only by substantive proceedings in equity in aid of the defective procedure at law. They are now in many cases regulated by statute, and by rules of court, and since the Judicature Acts may properly be regarded as matters of procedure. Information as to them should therefore be sought in works on Practice and Evidence, rather than in a text-book on the principles of Equity.

## SECTION II.—SPECIFIC PERFORMANCE.

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### ART. CLV.—*Nature of Jurisdiction in Specific Performance.*

(1) The specific performance of a contract means the carrying out of an executory contract by each of the parties thereto precisely according to its terms.

(2) A decree for specific performance is an equitable remedy which may be granted in a proper case. This form of equitable relief is more particularly, but not exclusively, associated with breaches of contracts for the sale and purchase of lands and leases.

#### PARAGRAPH (1).

The whole doctrine of specific performance, it has been said, rests on the ground that a man is entitled in equity

to have *in specie* the specific article for which he has contracted and is not bound to take damages instead (*Hexter v. Pearce*, [1900] 1 Ch. 341, at p. 346, *per* FARWELL, J.).

A contract for the sale of land is specifically performed on the part of the vendor by execution of a conveyance to the purchaser of the premises contracted to be sold, and, on the part of the purchaser, by acceptance of such conveyance and payment of the agreed purchase-money. When either party refuses or neglects to perform his part of such contract, the appropriate remedy available to the other is to bring an action for a decree for specific performance of the contract against the party in default.

#### PARAGRAPH (2).

The jurisdiction of the Court of Chancery in specific performance was based upon the absence or inadequacy of any remedy at common law. The only remedy in the Common Law Courts was by action for damages. The incompleteness or inadequacy of damages in the case of breach of contracts relating to land was a defect in the procedure which at an early period was remedied by the assumption by the Court of Chancery of jurisdiction to decree and enforce the specific performance of contracts of this class. The jurisdiction was soon extended to enforcing specifically other contracts for the breach of which damages were regarded as an incomplete remedy, and in respect of which the court was able to enforce the execution of its judgment. The various classes of contract in which relief by specific performance is obtainable will be considered in the ensuing Articles. The equitable remedy of specific performance is, however, peculiarly associated with contracts relating to sales and leases of land, and is more frequently applied for in the courts in connection therewith than in any other class of contract.

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ART. CLVI.—*Appropriate Tribunal.*

(1) All actions for the specific performance of contracts between vendors and purchasers of land, including contracts for leases, are assigned to the Chancery Division of the High Court.

(2) Actions for the specific performance of contracts other than those relating to land are usually, but not necessarily, tried in the Chancery Division.

(3) In actions for breach of contract to deliver specific or ascertained goods, specific performance may be ordered by any Division of the High Court.

PARAGRAPH (1).

This express assignment to the Chancery Division of actions for specific performance of contracts for the sale of land and for leases was effected by the Judicature Act, 1873, sect. 34.

PARAGRAPHS (2) AND (3).

Actions for the specific performance of any other contracts than those for the sale of lands, or for leases, have not in terms been assigned to the Chancery Division, and may therefore be instituted in any Division of the High Court.

Inasmuch, however, as specific performance was a remedy originally within the exclusive jurisdiction of the Court of Chancery, the Chancery Division is still the more appropriate forum for all actions to enforce the specific performance of contracts. But it is provided by sect. 52 of the Sale of Goods Act, 1893, that in any action

for breach of contract to deliver specific or ascertained goods, the court (*i.e.*, any Division of the High Court in which the action is being tried) may, if it think fit, on the application of the plaintiff, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms and conditions as to damages, payment of price, and otherwise as to the court may seem just, and the application by the plaintiff may be made at any time before judgment. This section reproduces the provisions of the Mercantile Law Amendment Act, 1856, sect. 2 (as modified by the Judicature Acts), which itself was an extension of the provisions of the Common Law Procedure Act, 1854, sect. 78.

It should be mentioned that the county courts have jurisdiction in actions for specific performance of agreements for sale, purchase, or lease of any property, where in the case of sale the purchase-money, or in case of a lease, the value of the property does not exceed £500 (see County Courts Act, 1888, sect. 67; *Rex v. Birmingham County Court Judge*, [1904] 1 K. B. 827).

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#### ART. CLVII.—*Jurisdiction Discretionary.*

The remedy of specific performance is one which it is peculiarly within the discretion of the court to grant or to refuse. Accordingly—

- (i) The court may, even where the contract is valid and is one of a kind which it specifically enforces, yet refuse to decree specific performance on the ground that the circumstances would make this form of relief inequitable.
- (ii) The court may in appropriate cases grant specific performance of a contract un-

conditionally or with a variation in the expressed terms of the contract, or with compensation or abatement in price.

(i) It has frequently been pointed out by the judges that the granting of specific performance is a matter of discretion. The exercise of such discretion is not, however, capricious or arbitrary, but is governed according to fixed and settled rules and principles; in other words, the discretion must be exercised judicially (see *per* Lord ELDON, *White v. Damon* (1802), 7 Ves. sen. 30, at p. 35: *per* Lord MACNAGHTEN, *Bell v. Kennedy* (1890), 15 App. Cas. 75, at p. 105). As a general rule, the equitable remedy will in appropriate cases be granted, unless the plaintiff has by his conduct disentitled himself to relief in equity, or great hardship would be involved (see *Hexeter v. Pearce*, [1900] 1 Ch. 341, at p. 346, *per* FARWELL, J.). Mere inadequacy of consideration or excess of value is not a ground for exercising such discretion by refusing specific performance (*Haywood v. Cope* (1858), 25 Beav. 140).

On the other hand, the court would exercise its discretion, and refuse to enforce the specific performance of a contract, where to decree its performance would be to compel a person who has entered inadvertently into it to commit a breach of duty, as where trustees have entered into a contract the performance of which would be a breach of trust (see *Delves v. Gray*, [1902] 2 Ch., at p. 611). Again, the court, in its discretion, would not compel a purchaser to accept a property which, if he took no steps to prevent it, would by reason of its state (*e.g.*, if it were a brothel) at the time of the sale expose him as owner to criminal proceedings. In such a case the court at any rate would not force specific performance upon an innocent purchaser, though it might be otherwise if the purchaser knew, or ought to have known, the state of the property at the time of the contract (see *Hope v. Walter*, [1900] 1 Ch. 257, at p. 260, *per* LINDLEY, M.R.).

When the court refuses to specifically perform a contract on the ground of hardship it does not thereby rescind it. When a contract is rescinded the parties to it are placed

as nearly as possible in the position they would be in had no contract been made. When, however, the court merely refuses to perform a contract, the contract remains and the plaintiff is left to his remedy by recovery of damages at law (see *Wedgwood v. Adams* (1843), 6 Beav. 600). "I conceive the doctrine of the court to be this," said Lord LANGDALE in the case last cited (6 Beav., at p. 605), "that the court exercises a discretion in cases of specific performance, and directs a specific performance, unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define, it must depend on the circumstances of each particular case. The court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should by its extraordinary jurisdiction interfere, and order a specific performance, knowing at the time that if it abstains from so doing a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." "In cases of specific performance" (said COTTON, L.J., in *Preston v. Luck* (1884), 27 Ch. D. 497, at p. 506), "the court does not grant that special equitable relief if it finds for any reason that it would be what is called a hardship, or unreasonable to compel the defendant specifically to perform the contract."

On this principle, in a contract for the sale of land where the vendor is unable to give a holding title to the purchaser the court will, in the exercise of its discretion, refuse to decree specific performance of the contract, but will leave the parties to their remedies at law (see *In re Scott and Alvarez's Contract*, [1895] 2 Ch. 603).

Where in fact any circumstances outside the written contract and independent of it can be shown to exist which would make a decree for specific performance inequitable, the court would not grant such relief (see *Clowes v. Higginson* (1813), 1 V. & B. 524, *per PLUMER, V.-C.*, at p. 527).

(ii) The circumstances under which the court in its discretion will decree specific performance of a contract with a variation in its expressed terms, or with compensation or abatement in price, are considered *post*, Arts. CLXI. and CLXII.

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**ART. CLVIII.—*Foundation of Jurisdiction : Inadequacy of Legal Remedy.***

The jurisdiction to decree the specific performance of any contract depends upon the absence of any remedy at common law or the inadequacy of the legal remedy by action for damages, from which it follows that :

- (i) Specific performance will be decreed only in cases where there was no adequate remedy at law.
- (ii) Specific performance will not be decreed in cases in which damages would afford complete compensation.

Unquestionably, the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled—that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed (see *Harnett v. Yielding* (1805), 2 Sch. & Lef. 548, at p. 553 ; see also *Ryan v. Mutual Tontine Association*, [1893] 1 Ch. 116, at p. 126). So that, as KINDERSLEY, V.-C., pointed out, the principle on which a Court of Equity proceeds is this. A Court of Law gives damages for the non-performance, but a Court of Equity says “that is not sufficient—justice is not satisfied by that remedy,” and therefore a Court of Equity will decree specific performance, because a mere compensation in damages is not a sufficient remedy and satisfaction for the loss of

the performance of the contract (see *Falcke v. Gray* (1859), 4 Drew. 651, at p. 657).

#### PARAGRAPH (1).

In the case of contracts for the sale of land, the Court of Chancery, regarding the legal remedy by action for damages as inadequate from an early period (at any rate from the reign of Henry VI., if not before ; see Fry on "Specific Performance," 4th ed., Additional Note C, "Cases illustrative of the early jurisdiction of Chancery in specific performance," pp. 683 *et seq.*), supplied an appropriate and complete remedy by decreeing the specific performance of the contract.

Specific performance of an agreement for a lease will be granted, even where the lease agreed upon is merely for a short term. Thus a decree for specific performance has been made in the case of a tenancy which was determinable at the end of the second year (*Lever v. Koffler*, [1901] 1 Ch. 543). In that case it was stated that, although specific performance is a discretionary remedy, it will be granted even in the case of a very short term in a proper case (see *ibid.*, at p. 547, *per* BYRNE, J.). But specific performance of an agreement for a mere tenancy from year to year has been refused, the remedy at law being regarded as sufficient in such case, and moreover the period of the tenancy might expire before the decree could be made which would render it useless (*Lavery v. Pursell* (1888), 39 Ch. D. 508, at p. 519, *per* CHITTY, J., and see *Starkey v. Barton*, [1909] 1 Ch. 284). Many other agreements relating to land, such as agreements for the exercise of options to purchase (see *Starkey v. Barton*, [1909] 1 Ch. 284), or take leases, agreements reserving rights of pre-emption, agreements for the sale of annuities, and agreements for the grant of easements, have been specifically enforced on the ground that the remedy of damages is inadequate.

For the same reason, contracts for the sale and delivery of specific chattels may, in exceptional cases, be ordered to be specifically performed, as in the case of heirlooms, or where a particular chattel is of unique value, or of

peculiar value to the plaintiff (see *Duke of Somerset v. Cookson* (1735), 3 P. Wms. 390). If damages would not be a sufficient compensation, the principle on which a Court of Equity decrees specific performance is just as applicable to a contract for the sale and purchase of chattels as to a contract for the sale and purchase of land (see *Falcke v. Gray* (1859), 4 Drew., at p. 658).

Contracts for the sale or allotment of stock or shares in railway or other public companies (*Paine v. Hutchinson* (1868), L. R. 1 Ch. 388) are specifically enforceable upon the same principle that damages would not compensate for their breach, for the amount of such stock or shares being limited, they are not always obtainable in the market.

An agreement for the sale of business premises, together with a business as a going concern (*Hawksley v. Outram*, [1892] 3 Ch. 359), or for the sale of goodwill with business premises, is a subject for specific performance.

Numerous other kinds of contract may be ordered to be specifically performed, provided that damages would be an incomplete remedy, and that the contracts are of such a nature that the court would be able to superintend and enforce the execution of its judgment, and that the plaintiff has not disentitled himself to relief (see Art. CLIX., *Essential Conditions of Relief*).

#### PARAGRAPH (2).

On the other hand, contracts the breach of which would be amply satisfied by compensation in money, are not subjects in respect of which the court will decree specific performance. On this ground the court in a variety of cases has refused to interfere where from the nature of the case the damages must be commensurate to the injury sustained (see *Harnett v. Yielding* (1805), 2 Sch. & Let. 548, at p. 553 ; see also *Rushbrooke v. O'Sullivan*, [1908] 1 I. R. 232).

The most prominent instance of contracts of this class is that of ordinary contracts for the sale and purchase of

goods and chattels of a description which is easily replaceable. The parties in the event of the breach of such contracts are left to their legal remedy of action for damages. "Thus, if a contract is for the purchase of a certain quantity of coals, stock, etc., this court will not decree specific performance, because a person can go into the market and buy similar articles, and get damages for the difference in the price of the articles in a Court of Law" (see *Falcke v. Gray* (1859), 4 Drew., at p. 658, *per* KINDERSLEY, V.-C.).

On this principle, specific performance is refused in the case of contracts for the sale or purchase of stock in the public funds, pecuniary damages enabling a purchase of similar stock (*Cuddee v. Rutter* (1719), 1 P. Wms. 570), of contracts for the loan of money, whether on mortgage, or otherwise (*South African Territories v. Wallington*, [1898] A. C. 309); but now so far as agreements to advance money on the debentures of a joint stock company are concerned, these are by statute to be specifically enforced (Companies (Consolidation) Act, 1908, s. 105).

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#### ART. CLIX.—*Essential Conditions of Relief.*

The court will decree specific performance only in cases where such remedy is (i) necessary, (ii) possible, (iii) effective, (iv) reasonable, and equitable in its operation, and (v) where the court is able to enforce the performance of the contract.

(i) That the equitable relief will not be granted unless it is *necessary* appears from the foregoing Article, which shows that the jurisdiction to grant specific performance is limited to cases in which the legal remedy is incomplete.

(ii) If specific performance of the contract is not in fact *possible* by reason, for example, of the defendant's

incapacity to perform his part of the contract, as where he is unable to make any title to the property or to convey any part of the subject-matter of the contract, the plaintiff would be left to his legal remedy.

The court will not make a decree requiring the performance of an act which the party is not lawfully competent to do (see *Harnett v. Yielding* (1805), 2 Sch. & Lef. 548).

(iii) The remedy must be *effective* or it will not be granted. Thus, a contract which from its nature or by its terms is revocable by the defendant would not be specifically enforced, for the day after the decree it might be rendered nugatory, and the court will not suffer its assistance to be invoked in vain (see *Sturge v. Midland Railway Company* (1858), 6 W. R. 233, at p. 234). Nor would a contract for partnership be enforced when the duration of the term of the partnership is not definitely specified, for in such case the partnership would be merely at will and determinable immediately by either party (see *Hercy v. Birch* (1804), 9 Ves. sen. 357 ; see also Partnership Act, 1890, sect. 32 (c)). So also an agreement for a lease under which the lessee is in possession, and has done acts which would occasion a forfeiture of the lease if granted, is not a subject for specific performance, as the remedy would be useless or ineffectual (see *Swain v. Ayres* (1888), 21 Q. B. D. 289).

(iv) The relief must be *reasonable and equitable in its operation*. If specific performance would in the particular circumstances be unreasonable or involve hardship, or be otherwise inequitable, the court in its discretion would refuse the relief (see the cases cited in Art. CLVII., *Jurisdiction Discretionary, ante*, pp. 390—393).

(v) *The court must be able to enforce the performance of the contract.* Unless an effective supervision is possible and the court is able to enforce its judgment, specific performance would be refused. Upon this principle contracts for the performance of personal services (see *Johnson v. Shrewsbury, etc. Railway Company* (1853), 3 De G. M. & G. 914 ; *Bainbridge v. Smith* (1889), 41 Ch. D. 462, at

p. 474), or contracts of a personal nature involving knowledge, skill, or other qualifications personal to the contracting party, such as a contract to sing or act at a theatre (*Lumley v. Wagner* (1852), 1 De G. M. & G. 604), will not be specifically enforced. Contracts for hiring and service (*Rigby v. Connol* (1880), 14 Ch. D. 482, at p. 487; *Baird v. Wells* (1890), 44 Ch. D. 661); contracts of agency (*Chinnock v. Sainsbury* (1860), 30 L. J. Ch. 409); contracts of apprenticeship (*De Francesco v. Barnum* (1890), 45 Ch. D. 430, at p. 437); contracts for the sale of goodwill apart from any business (*Baxter v. Conolly* (1820), 1 Jac. & W. 576); and contracts for the sale of a business apart from the premises on which it is carried on (*May v. Thomson* (1882), 20 Ch. D. 706), fall within the same category and are not subjects for a decree of specific performance. So a covenant by lessors of residential flats to employ a resident porter will not be specifically enforced (*Ryan v. Mutual Tontine Association*, [1893] 1 Ch. 116).

Contracts for building, repairs, or other works, are not ordinarily specifically enforceable (*Mayor, etc. of Wolverhampton v. Emmons*, [1901] 1 K. B. 515, at p. 524, *per ROMER, L.J.*), as the court is unable to exercise any supervision or enforce the execution of such works. But building agreements may be ordered to be specifically performed when the work to be done is clearly defined by the contract, and the plaintiff has a substantial interest which is of such a nature that he cannot adequately be compensated for breach of the contract by damages, and the defendant has by the contract obtained possession of the land on which the work is contracted to be done (*ibid.*, at p. 525; see also *Molyneux v. Richard*, [1906] 1 Ch. 34; *Rushbrooke v. O'Sullivan*, [1908] 1 I. R. 232). And the court will decree specific performance of agreements involving the execution of leases or other instruments containing covenants to repair (see *Paxton v. Newton* (1854), 2 Sm. & G. 437), although in the case of an agreement for a lease containing stipulations by the lessee to execute certain building works, specific performance of the agreement for the lease was granted, but was refused as to the building stipulations (*Kay v. Johnson* (1864), 2 H. & M. 118). In *Rushbrooke v. O'Sullivan*,

[1908] 1 I. R. 232, an action for specific performance of an agreement to rebuild and repair premises in accordance with the terms of the agreement, the court refused specific performance, but ordered an inquiry as to damages.

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ART. CLX.—*Specific Performance of Parol Agreements.*

The court may in certain cases order specific performance of parol agreements which by law are required to be in writing, and in particular specific performance of parol agreements may be ordered :

- (1) Where compliance with the legal requirement has been prevented by the fraud of the defendant ;
- (2) Where there has been such a part performance of the contract by the plaintiff as is unequivocally referable to the agreement ;
- (3) Where the defendant in an action for specific performance has not raised the defence of the Statute of Frauds on his pleadings, or has expressly admitted the contract ;
- (4) Where the sale is by direction of the court.

Under sect. 4 of the Statute of Frauds no action can be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning

them, unless the agreement, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith or some other person lawfully authorised. The enforcement of the legal remedy is barred if the statutory requirements are not complied with (see *Britain v. Rossiter* (1879), 11 Q. B. D. 123).

Notwithstanding this provision, however, specific performance of a parol agreement which under the statute ought to have been evidenced by writing may in some cases be ordered. In other words, equity has recognised certain exceptions to the statute or exceptional circumstances which will take the case out of the operation of the statutory rule.

#### PARAGRAPH (1).

If the reduction of the agreement to writing has been prevented by the fraud of the party against whom specific performance is sought, the non-compliance with the statute would afford no defence to an action for specific performance (see *Viscountess Montacute v. Maxwell* (1720), 1 P. Wms., at p. 616).

#### PARAGRAPH (2).

As to the doctrine of part performance, see Art. CII., *supra*.

#### PARAGRAPH (3).

The defence that the Statute of Frauds has not been complied with must in order to be effectual be expressly raised upon the pleadings (see Order 19, rule 15, *James v. Smith*, [1891] 1 Ch. 384, at p. 389). Where, therefore, in an action for specific performance the claim alleges a contract and the defendant in his defence does not plead the Statute of Frauds he is under the ordinary rules of pleading deemed to have waived his right. Specific performance may consequently be decreed, notwithstanding that the statute has not in fact been complied with (see *Attorney-General v. Day* (1749), 1 Ves. 218, at p. 221).

## PARAGRAPH (4).

In the case of a sale by and under the direction of the court specific performance may be decreed, even though the Statute of Frauds has not been complied with (see *Blagden v. Bradbear* (1806), 12 Ves. jun. 466, at p. 472).

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ART. CLXI.—*Specific Performance with Variation.*

Where a contract in writing omits a material term which was agreed upon by the parties, in an action for specific performance of the contract, parol evidence may be admitted to prove the variation, and the court may decree rectification and specific performance of the contract as rectified.

Parol evidence is as a general rule not admissible to contradict or vary a written contract (see *New London Credit Syndicate v. Neal*, [1898] 2 Q. B. 487). In the discretionary jurisdiction in specific performance, however, a defendant is allowed to prove by means of parol evidence that owing to fraud or mistake the written contract does not completely express the terms agreed upon by the parties (see *Ramsbottom v. Gosden* (1812), 1 V. & B. 165, at p. 168). And when by parol evidence some material term is shown to have been omitted from the written agreement, the court may at the instance of the defendant order specific performance with the parol variation (*Fife v. Clayton* (1807), 13 Ves. jun. 546). In such a case the plaintiff might obtain specific performance upon undertaking to perform the contract with the variation set up by the defendant (see *Smith v. Wheatcroft* (1878), 9 Ch. D. 223). Rectification of a written contract upon parol evidence of mistake, and a decree for specific performance of the contract as rectified, may, since the

Judicature Act, be obtained by the plaintiff in one action, in cases where there has been part performance, or the contract is not within the Statute of Frauds, or for any other reason the statute does not bar the remedy (see *Olley v. Fisher* (1886), 34 Ch. D. 367).

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### ART. CLXII.—*Specific Performance with Compensation or Abatement.*

(1) On a contract for the sale of land where the vendor is able to perform the contract in substance, but not completely, he is nevertheless entitled to compel specific performance by the purchaser, the vendor making compensation for the deficiency in value.

(2) Where the vendor is unable to perform the contract in substance he is not entitled to compel specific performance by the purchaser, but in such case the purchaser is, as a rule, entitled to enforce the contract as against the vendor, so far as it is in the vendor's power to perform it, with an abatement in the price proportionate to the deficiency in value.

#### PARAGRAPH (1).

When the vendor can substantially, but not literally, perform his contract, the purchaser is entitled to compensation in respect of the difference between the property which the vendor compels him to take and the property as described in the contract.

The right of the purchaser to compensation is usually provided for in the conditions of sale.

In the absence of any condition for compensation the difference between what the vendor contracted to do and what he can actually do is the subject of compensation. For example, if a leasehold interest of twenty years and nine months has in the contract been represented as a lease for twenty-one years, the vendor can compel specific performance, but the purchaser has a right to be compensated in respect of the difference (see *Mortlock v. Buller* (1804), 10 Ves. jun. 291, *per* Lord THURLOW, at p. 305). So where on the purchase of property by a tenant in possession it was described as being forty-six feet in depth, whereas in fact it was only thirty-three feet, the deficiency was held to be a subject for compensation (*King v. Wilson* (1813), 6 Beav. 124). On the same principle the existence of trifling incumbrances, such as a liability to a quit-rent, does not deprive the vendor of his right to specific performance. The vendor's right to insist upon specific performance with compensation exists, however, only in the case of a non-essential defect, and not where the defect is essential or material, as where the tenure of the property is different from that expressed in the contract. Nor can the vendor enforce the contract with compensation for a non-essential defect where he has knowingly misrepresented the property.

The conditions of sale frequently contain conditions as to compensation. A usual condition is that errors or misdescriptions in the particulars or conditions of sale shall not annul the sale, but shall entitle the purchaser to compensation. The principles above stated are applicable; thus where a purchaser will get substantially what he has contracted to buy, he will be compelled to complete with compensation even though there be a considerable deficiency of quantity, provided that such deficiency does not affect the substance of contract he has bargained for (see *Re Fawcett and Holmes* (1889), 42 Ch. D. 150). A condition of this sort has been held not to extend to any defect of title, but merely to error or misstatement in the subject-matter of the sale (see *Debenham v. Sawbridge*, [1901] 2 Ch. 98).

Another condition frequently is that there shall be no right to compensation in respect of any error of measurement. But notwithstanding any such condition, if the

error be material, or the result of misrepresentation calculated seriously to mislead a purchaser, the vendor cannot obtain specific performance (see *In re Terry and White's Contract* (1886), 32 Ch. D. 14; *Jacobs v. Rerell*, [1900] 2 Ch. 858). The principle of compensation, whether there be a condition or not, will not be applied where there has been any intentional misrepresentation, even though the difference be of such a character that if it had arisen from mere error it would have been the subject of compensation (see *Price v. Macaulay* (1852), 2 De G. M. & G. 339).

Moreover, notwithstanding any condition for compensation, if a contract contains a misdescription in a material and substantial point so far affecting the subject-matter of the contract as that it may be reasonably supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause for compensation (see *per TINDAL, C.J.*, in *Flight v. Booth* (1834), 1 Bing. N. C. 370, at p. 377). But a latent defect not of such a character as to bring the contract within the principle of *Flight v. Booth, supra*, will not prevent the court ordering specific performance with compensation (*Shepherd v. Croft*, [1911] 1 Ch. 521).

#### PARAGRAPH (2).

When the vendor has not got the whole interest which he is under contract to convey, he is not, as a rule, able to enforce the contract. On the other hand, under these circumstances, the purchaser generally has the right to insist upon taking the partial interest which the vendor can convey, with abatement of the agreed price by way of compensation for the difference (see *Mortlock v. Buller* (1804), 10 Ves. jun. 291, at p. 315; *Barker v. Cox* (1876), 4 Ch. D. 464). Such relief will not, it seems, be granted where the actual subject-matter which the vendor can convey is substantially different from that stated in the contract (see *Rudd v. Lascelles*, [1900] 1 Ch. 815). This jurisdiction to enforce the contract specifically with compensation for defects where the contract contains no

terms as to compensation, is based upon the equitable estoppel that where a vendor by contracting to sell an estate as his own has represented that it is within his power to convey the estate as described, and the purchaser has relied upon such representation, the vendor is precluded from afterwards saying that he has not got the entirety, and, therefore, the purchaser shall not have the benefit of his contract (see *Mortlock v. Buller*, and *Rudd v. Lascelles*, cited *supra*). This mode of relief by decree of specific performance with abatement is not, however, granted to a purchaser in any case in which it would involve hardship, or in which it would operate unreasonably, unjustly, or inequitably. Thus it would be refused when the partial performance of the contract would be prejudicial to third parties (see *Thomas v. Dering* (1837), 1 Keen, 729); or if the purchaser were from the first fully aware of the defect in the vendor's title (*Castle v. Wilkinson* (1870), L. R. 5 Ch. 534; see also *In re Childe and Hodgson's Contract* (1906), 54 W. R. 234); or when the misdescription of the subject-matter of the sale has been corrected at the auction (*In re Hare and O'More's Contract*, [1901] 1 Ch. 93); or where the compensation is incapable of assessment, as in the case of compensation for restrictive covenants (*Rudd v. Lascelles*, [1900] 1 Ch. 815). Nor would this relief be available to a purchaser when a condition exists which enables the vendor to annul the sale on the purchaser making, or insisting upon, a requisition with which the vendor may be unable or unwilling to comply (see, for instance, *In re Deighton and Harris's Contract*, [1898] 1 Ch. 458), for the vendor may reserve the right to rescind rather than to complete with compensation. But even when so protected the vendor could not annul the sale under the condition if he has no title whatever to the property sold (see *In re Jackson and Hadley's Contract*, [1905] 1 Ch. 603), and in the exercise of the power he must act reasonably and not arbitrarily (see *In re Starr-Bowkett Building Society* (1889), 42 Ch. D. 375).

ART. CLXIII.—*Title.*

An action for specific performance of a contract for the sale of land may be dismissed at the trial on the ground of a defect in the title of the vendor where such defect clearly appears upon the pleadings. Where no defect appears in the title, yet if the title has not been accepted by the purchaser, an inquiry as to title may be directed.

It is not within the province of this work to discuss in detail the nature of the title which a purchaser of land can legally require, or the law relating to the contract, conditions of sale, the abstract of title, and requisitions upon title. These topics form the subject of very numerous decisions, information as to which should be sought in the text-books on Conveyancing (see Prideaux's "Precedents in Conveyancing," 21st ed.; Dart's "Vendors and Purchasers," 7th ed.; Farrer on "Conditions of Sale").

It may, however, be stated generally, that on an open contract for the sale of real property, the vendor, as a rule, is obliged to give a good title. "A purchaser," said Lord Justice FRY, "of course has *prima facie* a right to a good title" (*Ellis v. Rogers* (1885), 29 Ch. D. 661, at p. 672). A good title has been said to be "one which an unwilling purchaser can be compelled to take, and contrasted with that any title which an unwilling purchaser cannot be forced to take is a bad one" (*per* LINDLEY, L.J., *In re Scott and Alvarez's Contract*, [1895] 2 Ch. 603, at p. 613).

In the case of an open contract for the sale of freeholds, the vendor, as a rule, is bound to deduce a title for at least forty years (Vendor and Purchaser Act, 1874, sect. 1).

The purchaser's right to title is very frequently regulated and restricted in practice by express stipulations

contained in the contract or conditions of sale. Thus the purchaser may by stipulation be precluded from requisitioning the vendor or making any inquiry of him respecting his title. Even when such a condition exists the purchaser would not be thereby precluded from taking any objection to the title which he can prove without requisition or inquiry of the vendor, and if the title be defective, specific performance would not be decreed (see *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515).

Moreover, the purchaser may by express condition be precluded from making any objection or inquiry whatever respecting the title. In such a case, as a rule, he will be obliged to accept the title, and specific performance is generally enforceable, even if the title prove defective (see *In re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190; *Hopkinson v. Chamberlain*, [1908] 1 Ch. 853). Exceptions, however, there are to this rule, as, for example, where the defect in the title has been disclosed by the vendor, where there has been mutual mistake as to the subject-matter of the contract, or where the sale is by the court. And, notwithstanding such a strict condition, where such a vital defect exists that the vendor cannot give a holding title to the purchaser, the court would refuse to decree specific performance, which if enforced would involve the purchaser in a litigation to which he would have no defence, for specific performance has never been granted "when the purchaser shows the court that the title he is asked to have forced on him is bad in the sense that he can be turned out of possession to-morrow" (*In re Scott and Alvarez's Contract*, [1895] 2 Ch. 603; see *per* LINDLEY, J., at p. 613).

The trend of modern decisions seems to be that, apart from such stipulations as to title, the court will not compel an unwilling purchaser to accept a title which is doubtful as to fact or law. For example, where the validity of a title depended upon the doubtful question whether the predecessor in title of the vendor had purchased without notice of the defect in title, the court refused to force the title upon the purchaser (*In re Handman and Wilcox's Contract*, [1902] 1 Ch. 599). So, also, where the title

depended upon the determination of complicated and ambiguous transactions (*In re Douglas and Powell's Contract*, [1902] 1 Ch. 296). On the same principle, the court refused to decree specific performance of a contract for sale against the purchaser when a bona fide claim affecting the vendor's title had been made by a third party, though no action to enforce such claim was actually pending (*George v. Thomas* (1904), 90 L. T. 505). But when a good title is clearly established, the court, it would seem, will not refuse specific performance because it is not established in the precise mode set out in the conditions of sale. Thus, where by such conditions the title was to be deduced from a certain instrument, and on investigation it was found that the vendor had taken no title under such instrument, but had since acquired a good title under the Statutes of Limitations, the contract was enforced against the purchaser (*In re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1).

Where the defect of title alleged depends on the construction of a difficult document, the proper course of proceeding is by means of a summons for construction. If proceedings are taken by vendor and purchaser summons the court may refuse the vendor relief on the ground that until the document is construed the title is too doubtful to force on an unwilling purchaser (*In re Nichols and Von Joel's Contract*, [1910] 1 Ch. 43).

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#### ART. CLXIV.—*Various Defences to claim for Specific Performance.*

The following among other grounds constitute defences to an action for specific performance which would justify the court in refusing the equitable relief :

- (i) Absence of any binding contract, whether owing to incompleteness of form, non-compliance with the Statute of Frauds, or otherwise.

- (ii) Incapacity of either party to contract.
- (iii) Absence or failure of consideration.
- (iv) Illegality of the contract.
- (v) Contract by a corporation *ultra vires*.
- (vi) Want of mutuality.
- (vii) Uncertainty or ambiguity of the contract.
- (viii) Non-performance of a condition precedent.
- (ix) Want of title in vendor.
- (x) Fraud, misrepresentation, or mistake.
- (xi) Hardship or unreasonableness.
- (xii) Rescission of the contract.
- (xiii) Laches or delay.

The foregoing enumeration must not be taken to be an exhaustive category of possible defences to an action for specific performance. It represents merely a list of the characteristic defences available and of frequent occurrence in practice. It should, moreover, be considered as supplemental to the rules relating to the jurisdiction and conditions of relief, which have been discussed in the preceding Articles.

(i) There can be no specific performance unless there is a concluded and binding contract between the parties. For information as to what constitutes a binding contract reference must be made to the text-books upon the law of contract.

A defence to the action for specific performance is frequently based upon the provisions of sect. 4 of the

Statute of Frauds, which, in the case of "any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," requires the agreement or some memorandum or note thereof to be in writing and signed by the party to be charged therewith, or some lawfully authorised agent. There are very numerous decisions as to what note or memorandum in writing is sufficient to satisfy the statute, which it is not necessary here to discuss. The contract may be, and very frequently is, contained in correspondence between the parties. In this case the whole of the correspondence must be taken into account, and not merely isolated letters, and if a complete contract appear upon the correspondence it may be specifically enforced, even though it may have been intended to embody the terms in a more formal document. But where there is such an intention it must be clear that the formal document is intended to contain nothing except the terms agreed upon. Thus where a lady agreed to a purchase subject to a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract," the court held that there was no concluded agreement (*Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284).

Where the Statute of Frauds is relied upon as a defence it must be specially pleaded (see Order 19, rule 15). Under the construction of equity, however, the contract in certain cases may be taken out of the operation of the statute so as to be capable of specific performance, even though the provisions of the statute have not been complied with (see Art. CLX., *Specific Performance of Parol Agreements*).

(ii) The personal incapacity of either of the parties to enter into or be bound by the contract, by reason of infancy (see *Lumley v. Rarescroft*, [1895] 1 Q. B. 683), coverture, insanity, or otherwise, would offer the same defence to a claim for specific performance as to an action for damages for breach of the contract, and need not here be discussed.

(iii) Specific performance of a voluntary contract, that is, a contract entered into without consideration, will not

be decreed (see *Jefferys v. Jefferys* (1811), Cr. & Ph., at p. 141 ; see also *In re Earl of Lucan* (1890), 15 Ch. D. 470).

Failure of consideration in some cases will also afford a defence, as for instance where the contract, by destruction of the subject-matter, becomes impossible of performance (see *Couturier v. Hastie* (1856), 5 H. L. C. 673).

(iv) When a contract is illegal by reason of being at its inception, or subsequently becoming, opposed to statute law (see *Atkinson v. Ritchie* (1809), 10 East, 533, at p. 534), or being opposed to public policy, as in the case of a contract to prevent a criminal prosecution (*Jones v. Merionethshire, etc. Society*, [1892] 1 Ch., at p. 188), it is not enforceable either at law or in equity. When, in fact, the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal, and cannot be enforced (see *Consolidated Exploration and Finance Company v. Musgrave*, [1900] 1 Ch. 37).

(v) A contract by a corporation or limited company which is *ultra vires*, or beyond its powers, as being of a nature not included in the charter or memorandum of association, cannot be specifically enforced (see *Ashbury Railway Carriage and Iron Company v. Riche* (1875), L. R. 7 H. L. 653). But a contract by directors of a company which is in excess of the powers of the directors, but within the powers of the company, might, if subsequently duly ratified (see *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 266), become a subject for specific performance. For examples of cases in which the defence that the contract was *ultra vires* has been unsuccessfully raised in a suit for specific performance see *Eastern Counties Railway Company v. Hawkes* (1855), 5 H. L. C. 331 ; *Corbett v. South Eastern and Chatham Committee*, [1905] 2 Ch. 280.

(vi) Want of mutuality in the contract is a defence to a claim for specific performance. " Whenever, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally

incapable of enforcing it against the other" (see Fry, "Specific Performance," 4th ed., at p. 203). The court, it has been said, does not grant specific performance unless it can give full relief to both parties (see *Blackett v. Bates* (1865), L. R. 1 Ch. 117, at p. 124, *per* Lord CRANWORTH, L.C.). This, however, is not so when all the plaintiff seeks is an injunction to restrain the defendant from preventing him performing the contract. That will be granted though the contract is not one which the court could compel the plaintiff to perform (*John Jones and Sons, Limited v. Tankerville (Earl)*, [1909] 2 Ch. 440).

Exceptions to, or limitations of the rule are that the court may enforce specific performance in favour of a party who has not signed a contract within sect. 4 of the Statute of Frauds against one who has; and where a vendor, having merely a partial interest, could not enforce the contract against the purchaser, specific performance with an abatement in price may nevertheless, as we have already seen, be decreed in favour of the purchaser.

(vii) The contract in order to be executed by the court must be certain and defined (see *Lord Walpole v. Lord Orford* (1797), 3 Ves. jun. 401, at p. 420). If any vagueness, or uncertainty, as to the terms of the contract exist, specific performance would be refused. In *Douglas v. Baynes*, [1908] A. C. 477, a decree for specific performance of a contract for the sale of land was refused on the ground of uncertainty of the consideration under the terms of the contract. But that in law is certain which is capable of being made certain, and therefore where what precisely is to be done under the contract is left to the option of the plaintiff, the court will, when he has decided what should be done, specifically enforce his decision (*South Eastern Railway v. Associated Portland Cement Manufacturers* (1900), *Limited*, [1910] 1 Ch. 12).

(viii) The non-performance or non-observance of a condition precedent will constitute a defence to an action for specific performance of the contract. Thus where an agreement for a lease contains a condition precedent to the granting of the lease (*e.g.*, to erect buildings or do repairs), specific performance will be refused unless the

condition has been performed (see *Williams v. Brisco* (1882), 22 Ch. D. 441; see also *Lloyd v. Nowell*, [1895] 2 Ch. 744, as to waiver of a condition).

(ix) The inability of a vendor to make a good title to the property contracted to be sold before the day named for completion may be a bar to specific performance (see *Pemsel v. Tucker*, [1907] 2 Ch. 191). So where a vendor contracted to convey certain mines which he had no power to convey, nor to compel a conveyance of from any other person, specific performance was refused (*Bellamy v. Debenham*, [1891] 1 Ch. 412).

But though the right of a purchaser to repudiate the contract on the ground that the title is defective may be a defence to a claim for specific performance, he must exercise his right of repudiation as soon as he knows of the vendor's inability to make a good title, and he cannot repudiate after a decree for specific performance has been made, except by leave of the court (*Halkett v. Earl of Dudley*, [1907] 1 Ch. 590).

The nature of the title which can be insisted upon by a purchaser in the case of a contract for the sale of land depends usually upon the terms of the contract or the conditions of sale.

(x) Fraud (*Union Bank v. Munster* (1887), 37 Ch. D., at pp. 53 *et seq.*), or fraudulent, or even innocent misrepresentation (*Archer v. Stone* (1898), 78 L. T. (n.s.), at p. 35; *Wanton v. Coppard*, [1899] 1 Ch., at p. 97) by a plaintiff which induced the defendant to enter into the contract, or fraud in the course of the performance of the contract, or fundamental mistake (*Van Praagh v. Everidge*, [1903] 1 Ch. 434; *Beale v. Kyte*, [1907] 1 Ch. 564), are grounds upon which the court will refuse specific performance, for "he who comes into equity must come with clean hands" (see *ante*, pp. 379—381; see also *Seddon v. North Eastern Salt Company*, [1905] 1 Ch. 326, at p. 332).

A mistake of law may afford a defence to a claim for specific performance (*Allcard v. Walker*, [1896] 2 Ch., at p. 381).

(xi) Hardship or unreasonableness affords a ground of defence to an action for specific performance in the sense that if enforcing the contract specifically would involve hardship, or in the circumstances would be unreasonable, the court in the exercise of its discretion would refuse a decree for specific performance. Instances of the refusal of a decree upon these grounds have been considered in Art. CLVII., *Jurisdiction, discretionary*. The meaning of hardship in the construction placed upon it in equity has been discussed in Art. CLIX., *supra* (*In re Hightett and Bird's Contract*, [1903] 1 Ch., at p. 293, *per ROMER, J.*).

(xii) When there has been a rescission of the contract specific performance will never be ordered, whether the rescission was for fraud, or was under power reserved in the contract (*In re Weston and Thomas's Contract*, [1907] 1 Ch. 244), or by actual or implied agreement between the parties to rescind (*Vezey v. Rashleigh*, [1904] 1 Ch. 534), or by conduct of the plaintiff amounting to waiver of his rights under the contract. Where the plaintiff has elected another remedy, specific performance will be refused. As to obtaining an order for rescission in the course of an action for specific performance, see Art. CLXVI., *post*.

(xiii) A plaintiff to be entitled to the equitable relief of a decree for specific performance must be "ready, desirous, prompt, and eager." Unreasonable delay in enforcing his claim or in the performance of his part of the contract will as a rule be a defence to the action (*Lery v. Stoyden*, [1899] 1 Ch. 5).

In cases in which time is of the essence of the contract it must be strictly observed (see *Tadcaster Tower Brewery Company v. Wilson*, [1897] 1 Ch., at p. 711).

**ART. CLXV.—*Judgment and Incidental Relief.***

The judgment in an action for specific performance may contain such of the following, or other, orders, declarations, and directions as the circumstances of the case may require :

- (i) Order for specific performance.
- (ii) Order for inquiry as to title.
- (iii) Order for compensation or abatement.
- (iv) Declaration of unpaid vendor's lien.
- (v) Order for inquiry as to rents and profits.
- (vi) Order for inquiry as to interest.
- (vii) Order for execution of conveyance and delivery of title-deeds.
- (viii) Order for inquiry as to damages.
- (ix) Order for return of deposit.

The form of judgment or decree for specific performance, and the directions consequential thereon, must necessarily depend upon the particular circumstances of each case. In contracts relating to the sale and purchase of land the form of the judgment will vary according to whether the plaintiff, who has obtained the decree, be the vendor or the purchaser. In some cases, again, the title may have been accepted or established. In others where the title has not been admitted or proved before judgment a reference as to title will be necessary. Various declarations, and directions or orders consequential upon the decree, or modes of incidental relief appropriate in the particular circumstances, may be incorporated in the judgment. Those of more frequent occurrence in practice are mentioned above, and will now be explained. but the

list is by no means exhaustive. Injunctions as ancillary to specific performance are discussed in the next section (Art. CLXXXI.).

(i) *Order for specific performance.*—The declaration that the contract sued upon is a binding contract, and ought to be specifically performed, is, of course, the main object of the action.

Such an order may be in the following form : “ Declare that the agreement dated the      day of      in the pleadings mentioned ought to be specifically performed and carried into execution, and order and adjudge the same accordingly.”

Or, in the case of specific performance of a contract for sale of land : “ The court doth declare that the agreement in the pleadings mentioned constituted a binding contract between the plaintiff and the defendant for the sale by the defendant to the plaintiff of      acres of the defendant’s freehold land situate at      in the county of      at the price of £      , and that the same ought to be specifically performed and carried into effect ; and doth order and adjudge the same accordingly ” (see *North v. Perceval*, [1898] 2 Ch. 128 ; see also *Seton on “Decrees,”* 7th ed., pp. 2136–2138 ; *Cooper v. Morgan*, [1909] 1 Ch. 261).

When the title has not been established, it is usual for the decree to declare the right to specific performance in case a good title can be shown.

(ii) *Inquiry as to title.*—The court may before, or at the trial of an action for specific performance, direct an inquiry as to the title of the vendor. Such an inquiry may be ordered not only in the case of contracts relating to freeholds or leaseholds, but in any case in which a decree for specific performance could be made. Hence it has been ordered in the case of a contract for sale of mining shares (*Curling v. Flight* (1848), 2 Ph. 613).

The order for inquiry as to title is usually made at the trial, but, under Order 33, rule 2, any necessary inquiries

may be ordered to be made at any stage of the proceedings.

Questions as to title may also be determined on originating summons under the Vendor and Purchaser Act, 1874 (*In re Baker and Selmon's Contract*, [1907] 1 Ch. 238).

(iii) *Order for compensation or abatement.*—The circumstances under which, and the principles on which, compensation for deficiency or an abatement in price will be ordered in an action for specific performance have been discussed in Art. CLXII.

(iv) *Declaration of unpaid vendor's lien.*—The nature of the equitable lien of an unpaid vendor over the land sold in respect of the unpaid purchase-money, interest, and costs has been explained (*supra*, Art. CXLIII.). In a proper case the vendor may in his action for specific performance obtain a declaration of the existence of his lien with "liberty to apply" to the court to enforce it. For form of such declaration, see Seton on "Decrees," 7th ed., pp. 2220—2223. As to the mode of enforcing the lien see *supra*, Art. CXLIII.

(v) *Inquiry as to rents and profits.*—As a rule a vendor is entitled to the rents and profits of the property sold up to the date fixed for completion. As from that date the purchaser is entitled to the rents and profits, and the vendor must account to him for what he has received. When necessary, therefore, the judgment will order an account to be taken of rents and profits received by the vendor (*Bennet v. Stone*, [1903] 1 Ch. 510; see further on this subject Fry on "Specific Performance," 5th ed., Chap. V.).

(vi) *Inquiry as to interest.*—In the absence of any express term or stipulation in the contract, or conditions of sale, as to interest, a purchaser who completes after the time stipulated is usually regarded as having been in possession since the date fixed for completion. From that date, therefore, being entitled to the rents and profits, if any, he is generally liable for interest on the

unpaid purchase-money at the rate of 4 per cent., but not when the delay in execution was due to the vendor. An inquiry as to the amount of interest due will be ordered when necessary.

The contract, however, usually stipulates for the payment of interest if the purchase be not completed on the day named. In this event an inquiry as to the amount of interest due from the purchaser on the unpaid purchase-money will be ordered, and the amount of the rents, profits, and taxed costs will be ordered to be deducted from the amount of the purchase-money and interest (*Bennet v. Stone*, [1903] 1 Ch. 510). But notwithstanding any such stipulation, a vendor who has been guilty of wilful default will not be entitled to interest (*Halkett v. Earl of Dudley*, [1907], 1 Ch. 590. See further Fry on "Specific Performance," 5th ed., Chap. V., and Farrer on "Conditions of Sale," pp. 59 *et seq.*).

(vii) *Execution of conveyance and delivery of title-deeds.*—In an action by a purchaser for specific performance, a usual order is "that upon the plaintiff paying to the defendant the balance which shall be certified to be due to him in respect of the purchase-money and interest, after deduction of the amount of the rents, profits, and taxed costs, the defendant to execute a proper conveyance of the lands comprised in the agreement to the plaintiff or to whom he shall appoint, such conveyance to be settled by the judge in case the parties differ, and deliver to the plaintiff (upon oath if required) all deeds and writings in his custody or power relating thereto" (see *North v. Pereeval*, [1898] 2 Ch. 128, at p. 133; *Jeffery v. Stewart* (1899), 80 L. T. 17).

In the same way the execution of any other instrument, such as a lease, transfer, assignment, etc., which may be necessary to the specific performance of a contract, may be ordered.

(viii) *Inquiry as to damages.*—In actions for specific performance there is power (under Lord Cairns's Act (the Chancery Amendment Act, 1858), sect. 2, or the Judicature Acts) to award damages in addition to specific

performance in whole or in part, in substitution for specific performance, or where there is no case for specific performance.

When damages have not been assessed at the trial the judgment may direct an inquiry as to the amount of damages sustained by the plaintiff by reason of the non-performance of the contract by the defendant, or an inquiry whether the plaintiff has sustained any and what damages by reason of the delay of the defendant in completion of the agreement (see *Royal Bristol Permanent Building Society v. Bomash* (1887) 35 Ch. D. 390).

A plaintiff may be awarded damages although he may not be entitled to specific performance. So where a plaintiff by delay in payment of the balance of the purchase-money was held to have disentitled himself to equitable relief, he was awarded damages, as his conduct did not amount to a repudiation of the contract (*Cornwall v. Henson*, [1900] 2 Ch. 298). A plaintiff cannot, however, obtain rescission of the contract and, at the same time, damages for its breach (*Henty v. Schröder* (1879), 12 Ch. D. 666).

For form of judgment for specific performance with inquiry as to damages, see Seton on "Decrees," 7th ed., p. 2170, form 4; for form of order for damages for failure to make good title and for non-performance, *ibid.*, p. 2198, form 5.

(ix) *Return of deposit.*—Where a purchaser has paid a deposit and an action brought by the vendor against him for specific performance has been dismissed for want of title or otherwise, the defendant is usually entitled to an order for the return of his deposit with interest.

"The deposit is not merely a part payment of the purchase-money, but constitutes a security for the completion of the purchase, so that if the purchaser fails to perform his part, the vendor may retain it. On the other hand, if the vendor fails to perform the contract on his

part, and there is no default on the part of the purchaser, the latter may, in the absence of a stipulation to the contrary, recover the deposit from the vendor" (see *Levy v. Stogden*, [1898] 1 Ch. 478, at p. 485, *per* STIRLING, J.). Where in a vendor's action rescission only is asked for the deposit is forfeited even though in the contract there is no express condition of forfeiture (*Hall v. Burnell*, [1911] 2 Ch. 551). On the other hand where a resale is asked, the defendant must be given credit for the deposit (*Shuttleworth v. Clews*, [1910] 1 Ch. 176). Where the contract fails through the vendor's default the purchaser has a lien upon the estate for the amount of his deposit and interest (see *Whitbread and Company, Limited v. Watt*, [1901] 1 Ch. 911).

For form of order for return of deposit, see Seton on "Decrees," 7th ed., p. 2198, form 5.

An order for rescission and return of the deposit with interest may be made on summons under the Vendor and Purchaser Act, 1874 (*Carlish v. Salt*, [1906] 1 Ch. 335).

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#### ART. CLXVI.—*Modes of Enforcing Judgment in Default of Compliance.*

A judgment for specific performance when not complied with may be enforced by the plaintiff in one or more of the following ways according to the terms of the judgment, that is to say, the plaintiff may obtain :

- (i) An order appointing a time and place for payment of the purchase-money and delivery of the conveyance, or a period within which the defendant is required to comply with the judgment, and in default of compliance proceedings may

be taken against the defendant for contempt;

- (ii) A direction that the act required by the judgment to be done be done by the plaintiff at the cost of the defendant;
- (iii) An order for the rescission of the contract;
- (iv) An order for enforcing a vendor's lien by sale or receiver;
- (v) A vesting order in lieu of conveyance, or an order appointing some person to execute a conveyance.

(i) After obtaining judgment the plaintiff may on motion obtain an order for completion of the contract by payment of the unpaid purchase-money and delivery of the conveyance and title-deeds at a specified time and place (see *Morgan v. Briscoe* (1886), 32 Ch. D. 192), or an order appointing a time within which the defendant must comply with the judgment. In the event of non-compliance with such an order a writ of sequestration may be immediately issued against the defendant's estate and effects (see Order 43, rule 6; see also *Debtors Act*, 1869, sect. 8).

A judgment for the payment of money is enforceable by writ of *fieri facias* or *elegit* (Order 42, rule 3); a judgment for the delivery of possession of land, by writ of possession (Order 42, rule 5); a judgment for the recovery of any property other than land or money, by writs of delivery, attachment, or sequestration (Order 42, rule 6); a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, by writ of attachment, or by committal (Order 42, rule 7). Application for leave to issue a writ of attachment must be on notice to the party against whom the attachment is to be issued (Order 44, rule 2).

(ii) Besides, or instead of, proceedings against the disobedient party for contempt, the court may direct that the act be done, so far as practicable, by the party who has obtained judgment, or some other person appointed by the court, at the cost of the disobedient party, and execution may subsequently issue for the amount of the expenses incurred (Order 42, rule 30).

(iii) An order for the immediate rescission of the contract may be obtained on application by motion when the party in default has refused to complete, otherwise the order may be for rescission in default of completion within a time named (*Griffiths v. Vezey*, [1906] 1 Ch. 796).

(iv) In cases where the plaintiff is a vendor, and in the judgment for specific performance has obtained a declaration that he is entitled to a lien for unpaid purchase-money, he may obtain on motion or by petition an order for the enforcement of his lien by sale of the property, by appointment of a receiver pending sale, or in some cases by injunction to restore possession of the property (*Allgood v. Merrybent, etc., Railway Company* (1886), 33 Ch. D. 571). As to lien on proceeds of sale of leaseholds, see *Davies v. Thomas*, [1900] 2 Ch. 462.

(v) In cases where the plaintiff is a purchaser of land, and has obtained judgment for specific performance, when he is unable to get a conveyance of the property, he may obtain a vesting order, vesting the defendant's estate in him (Trustee Act, 1893, sects. 31—34) or an order nominating some person to execute a conveyance of the estate to him (Judicature Act, 1884, sect. 14).

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### SECTION III.--INJUNCTIONS.

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#### ART. CLXVII.—*Nature of Injunctions.*

(1) An injunction is an order of the court granted for the purpose of restraining the doing, continuance, or repetition, by the person enjoined, or his servants or agents, of some wrongful act, which constitutes an infringement of a legal or equitable right.

(2) A mandatory injunction is one which directs the performance of some positive act, with the object of restoring the condition of things existing before the infringement of the plaintiff's right.

(3) An interim or interlocutory injunction is one which is granted before the final determination of the rights of the parties, with the object of protecting the rights of a plaintiff pending the trial and judgment.

#### PARAGRAPH (1).

Formerly injunctions were granted by the Court of Chancery to restrain proceedings in other courts. These were known as "common injunctions," as distinguished from "special injunctions" to restrain the commission or continuance of wrongful acts unconnected with judicial proceedings. Common injunctions were granted to prevent the institution, or continuance of proceedings at law, which were opposed to the principles of equity, *e.g.*, when a claim resting on a bare legal title was asserted in the Common Law Courts, against a defendant who had an equitable estate or title, or when an action was brought at law upon a contract or instrument obtained by fraud or undue influence. This jurisdiction, the exercise of which not infrequently resulted in conflict between the Court of Chancery and the Courts of Common Law, was, in effect, abolished by sect. 24 (5) of the Judicature Act, 1873. In modern practice, since this legislation, a stay of proceedings may be directed by the court before which an action is pending, upon any ground which, under the earlier practice, would have justified the Court of Chancery in granting an injunction to restrain the legal proceedings.

In any cause or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind, relating to the same property or right, or arising out of the same contract, and the court or a judge may grant the injunction either upon or without terms, as may be just (Order 50, rule 12).

## PARAGRAPH (2).

A mandatory injunction is an order which not only requires the defendant to refrain from future illegal acts, but also directs him to restore matters to the condition in which they were when the claim arose, so as to place the plaintiff in the same position as he was in before the act complained of was done.

The jurisdiction to grant a mandatory injunction is exercised with extreme caution, and only in cases where the injury, although infringing a legal right, could not be adequately compensated by damages (see *Colls v. Home and Colonial Stores*, [1904] A. C. 179, at pp. 192, 193, 212; *Kine v. Jolly*, [1907] A. C. 1).

Such an injunction as a rule will be granted before the establishment of the plaintiff's right, only where irreparable injury would otherwise result, or where the defendant continues the acts complained of after direct notice, or after proceedings have been commenced. When, for example, a defendant in an action to restrain him from building so as to infringe the plaintiff's right to light, after receiving notice of motion for an injunction, endeavoured to anticipate the action of the court by hurrying on the building complained of, an injunction was granted ordering him to pull down the building so erected (see *Daniel v. Ferguson*, [1891] 2 Ch. 27).

So also, in an action for an injunction to restrain the defendant from building so as to obstruct the plaintiff's ancient lights, where the defendant evaded service of the writ, and, after having been previously warned by the plaintiff, continued to build, an interlocutory mandatory injunction was granted, ordering the defendant to pull down so much of the building as had been erected subsequently to the warning (*Van Joel v. Hornsey*, [1895] 2 Ch. 774).

Since the Judicature Acts the courts have full power to award damages in lieu of granting an injunction. Thus in an action for an injunction to restrain a trespass where

the actual damage amounted to less than the cost of removal of the works complained of, the court, in exercise of its discretion, gave damages in lieu of an injunction (*Rileys v. Mayor of Halifax* (1907), 97 L. T. 278). On the other hand, as the House of Lords pointed out in a recent important decision, "an injunction is necessary if, for instance, the injury cannot fairly be compensated by money, if the defendant has acted in a high-handed manner, if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court" (*Colls v. Home and Colonial Stores, Limited*, [1904] A. C. 179, at p. 193, *per* Lord MACNAGHTEN; see also *Kine v. Jolly*, [1907] A. C. 1).

A mandatory injunction formerly took the form of an order restraining the defendant from allowing the continuance of the matter complained of, *e.g.*, "from allowing the buildings to remain on the land." The practice in this respect has recently been altered, and an injunction which in effect requires the performance of some act, such as the demolition and removal of a building, is now to be expressed in a direct and mandatory form (see *Davies v. Gas Light and Coke Company*, [1909] 1 Ch. 248).

A mandatory injunction is not usually granted before the hearing of the action, but the court has jurisdiction to grant a mandatory injunction on an interlocutory application, and in an exceptional case it will be so granted (*Collison v. Warren*, [1901] 1 Ch. 812).

#### PARAGRAPH (3).

An interlocutory injunction is one that is granted only up to judgment in the action in which the interlocutory order is made. An interim order is, technically, an order granted until an ensuing motion day.

Under sect. 25 (8) of the Judicature Act, 1873, the court has a wide jurisdiction to grant an injunction by an interlocutory order in all cases in which it shall appear to be just or convenient. By an "interlocutory order" is meant any order other than one made by way of final

judgment at the hearing of a cause (*Salt v. Cooper* (1880), 16 Ch. D. 544).

In granting or refusing an interlocutory injunction, the court will not attempt to finally decide upon the legality or otherwise of the act complained of. But an interlocutory injunction will only be granted when the plaintiff has made out a *prima facie* case, so that it is probable that at the hearing of the action he will get a decree in his favour (see *Challender v. Royle* (1887), 36 Ch. D. 425, at p. 436, *per* COTTON, L.J.). The interlocutory order is, however, by no means conclusive as to the plaintiff's right. Its object is to preserve matters *in statu quo*, so that the relief claimed, and to which a *prima facie* title has been shown, may be effective if granted at the trial.

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#### ART. CLXVIII.—*Jurisdiction as to Granting Injunctions.*

An injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made.

Under the old Chancery jurisdiction before the Judicature Act, 1873, the court granted injunctions in cases where there was no remedy at law, and in cases where the legal remedy by action for damages was inadequate as a means of relief. Equitable rights were protected by injunction, *e.g.*, by restraining equitable waste, or breaches of covenants which, under the doctrines of equity, were held to run with the land. In addition also to the jurisdiction in specific performance, contracts were in some cases indirectly enforced by means of injunctions to restrain the breach of terms therein contained. A very important branch of the jurisdiction in injunctions was the protection of legal rights of property from infringement, and this, indeed, was exercised in some cases where no action at law would have been available. .

Under sect. 79 of the Common Law Procedure Act, 1854, in all cases of breach of contract or other injury where the party injured was entitled to maintain, and had brought, an action, he might claim an injunction against the repetition or continuance of such breach of contract or injury, or the committal of any breach or injury of a like kind arising out of the same contract, or relating to the same property or right.

The Judicature Act, 1873, sect. 25 (8), states in the general terms quoted above the present jurisdiction of every Division of the High Court with regard to the granting of injunctions. The precise effect of this enactment has been considered in numerous decisions. By it the High Court is enabled, without regard to the restrictions of the earlier practice, to grant an injunction whenever just or convenient so to do for the protection or assertion of the rights of the parties. In other words, wherever there is a legal right which independently of the Judicature Act is capable of being enforced either at law or in equity, then, whatever may have been the previous power, the High Court may interfere by injunction in protection of that right. On the other hand, in any case in which the parties would before the Act have had no right enforceable either at law or in equity, and in which, therefore, there was no power before the Act to grant an injunction, the High Court since the Act has no power to do so. The Act has in no way altered the principles upon which the jurisdiction to grant injunction was exercised (see *Day v. Brownrigg* (1878), 10 Ch. D. 294; *North London Railway Company v. Great Northern Railway Company* (1883), 11 Q. B. D. 30). The same sub-section provides for the granting of injunctions in cases of any threatened or apprehended waste or trespass.

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ART. CLXIX.—*Principles Regulating Exercise of Discretionary Jurisdiction.*

(1) In the exercise of its discretionary jurisdiction the court will regard the balance of

convenience in granting or refusing an injunction.

(2) An injunction will usually be granted to prevent any threatened infringement of a legal or equitable right, which, if not restrained, would afford a ground of action.

(3) An injunction would not be granted where under the circumstances of the particular case it would be oppressive, unjust, or inconvenient, and in particular :

- (i) Where the injury could be amply compensated by damages ;
- (ii) Where it would be impossible to comply with the order ;
- (iii) Where the court could not enforce its order effectively ;
- (iv) Where the plaintiff has acquiesced in the infringement of his right, or in the case of an equitable right has delayed unreasonably in applying for relief.

#### PARAGRAPH (1).

That the jurisdiction is discretionary, and that an injunction is not obtainable as of right or *ex debito justitiæ*, appears from the general principles regulating the grant of equitable relief which have already been considered (Art. CLII., *ante*, p. 377). It will be observed that the jurisdiction conferred by sect. 25 (8) of the Judicature Act merely empowers, but does not require, the court to grant an injunction, in any case in which it appears to be "just or convenient." The justice and convenience of

granting an injunction in each particular case must be ascertained by the court from the evidence. In modern practice, the grant or refusal of this remedy is to a great extent based upon settled legal principles (see *Beddow v. Beddow* (1878), 9 Ch. D. 89, at p. 93), for the words "just or convenient" do not in any way confer an arbitrary or unregulated discretion on the court (see *Harris v. Beauchamp*, [1894] 1 Q. B. 801, at p. 809).

In the case of an application for an injunction to restrain a sanitary authority from continuing a state of things which was in existence before the commencement of their powers, it was pointed out by JESSEL, M.R., that the court in granting such an injunction always looks at the balance of convenience (*Attorney-General v. Guardians of Poor of Dorking* (1882), 20 Ch. D. 595, at p. 607). So also on a motion for an interim injunction to restrain infringement of a right to light the court will grant an injunction where the balance of convenience is in favour of doing so rather than of allowing the defendant to complete his building with an undertaking to pull it down if required to do so (see *Newson v. Pender* (1884), 27 Ch. D. 43; *Smith v. Baxter*, [1900] 2 Ch. 138).

#### PARAGRAPH (2).

Where an injunction is sought in aid of a legal right the injunction will usually be granted as a matter of course when the legal right is established (see *Fullwood v. Fullwood* (1878), 9 Ch. D. 176). Generally when there is a legal or an equitable right being infringed which the court is called on to protect, and the circumstances do not render it inconvenient or inadvisable to interfere, the court will protect that right by injunction (see *Richardson v. Methley School Board*, [1893] 3 Ch. 510). Where a legal right has been invaded, e.g., where there is a continuing nuisance caused by the acts of the defendant, the plaintiff is *prima facie* entitled to an injunction in aid of such legal right (see *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287; see, however, *Rileys v. Mayor of Halifax* (1907), 97 L. T. 278).

Though as a general rule where a legal right is continuously infringed an injunction to protect it will be granted, the rule is subject to the qualification that damages may be awarded in substitution for an injunction in certain cases (see [1895] 1 Ch., at pp. 322, 323; *Colls v. Home and Colonial Stores, Limited*, [1904] A. C. 172, at p. 212; *Kine v. Jolly*, [1907] A. C. 1).

An injunction may be granted to protect an equitable right even though its infringement would not give a cause of action for damages at common law.

An injunction will be granted to restrain the threatened infringement of a legal right which would not be adequately protected by action for damages (see *Jordeson v. Sutton, etc. Gas Company*, [1899] 2 Ch. 217).

### PARAGRAPH (3).

(i) Even though there may be an actionable injury, nevertheless an injunction will not be granted to restrain it where it is of such a nature that damages would afford adequate compensation. "The very first principle of injunction law," said LINDLEY, L.J., "is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy" (*London and Blackwall Railway Company v. Cross* (1888), 31 Ch. D. 354, at p. 369).

(ii) No injunction will be granted requiring a defendant to do acts which are beyond his power; if the abatement of a nuisance or the removal of an injury by the defendant is physically impossible, the court will not make an order with which he cannot comply (see *Attorney-General v. Guardians of Poor of Dorking* (1882), 20 Ch. D. 595). "You are not to send a man to prison for not preventing that which he cannot prevent" (see *ibid.*, p. 606, per JESSEL, M.R.). But the mere fact that compliance by the defendant with the order would involve difficulty, inconvenience, or expense is not in itself sufficient ground for refusing to grant an injunction (see *Attorney-General v. Colney Hatch Lunatic Asylum* (1868), L. R. 4 Ch. 146).

(iii) Upon the principle that the court would be unable to properly enforce its order, an injunction will not be granted to compel the performance of any acts involving personal qualities or the continuous employment of labour. No injunction, for instance, would be granted to enforce a contract by an artist to paint a picture, an actor to perform at a theatre, or an author to write a book, though the breach of a negative stipulation in any such contract might be restrained by injunction (see *Lumley v. Wagner* (1852), 1 De G. M. & G. 604).

(iv) In cases in which an injunction is sought in aid of a legal right, lapse of time or delay, apart from acquiescence, will not afford any defence, unless it be such that it would bar the legal right under a Statute of Limitations (*Rowland v. Mitchell* (1896), 75 L. T. 65). But in the enforcement of an equitable right, mere delay short of the statutory period may defeat a plaintiff's claim for an injunction. Acquiescence by a party with knowledge of his rights, whereby the other party has been encouraged to expend money or alter his condition, is always material, especially upon an interlocutory application for an injunction, and in a clear case will bar the right to relief by perpetual injunction.

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#### ART. CLXX.—*Terms Imposed as Condition of Relief.*

On an application for an injunction the court in granting or refusing the same may in its discretion impose such terms or require such undertakings as may seem just in the circumstances.

It is provided by sect. 25 (8) of the Judicature Act, 1873, that any interlocutory order of the court granting an injunction may be made either unconditionally or upon such terms and conditions as the court shall think just. This provision is merely in accordance with the

earlier practice of the Court of Chancery, which in granting equitable relief by means of injunction imposed such terms as in the particular case might be necessary to secure justice.

Thus, instead of granting an injunction to restrain an infringement of ancient lights, the court may require an undertaking by the defendant to remove the building or other obstruction causing such infringement in the event of the plaintiff establishing his right.

In a recent action to restrain the obstruction of ancient lights in lieu of granting an injunction, the court made a declaration of the plaintiffs' right, upon the defendant undertaking to give the plaintiffs reasonable notice of his intention to build and to submit to them plans of his proposed building (*Smith v. Barter*, [1900] 2 Ch. 138). And in an action to restrain a nuisance occasioned by noise, heat, and smell from a restaurant underneath the plaintiff's flat, upon the defendant undertaking to carry out certain suggested improvements, no order for an injunction was made (*Sanders-Clark v. Grosvenor Mansions Company, Limited*, [1900] 2 Ch. 373).

Again, in cases of alleged infringement of patents or copyrights, instead of granting an interlocutory injunction, the court, as a condition of not doing so, may require an account to be kept by the defendant of all profits accruing to him from the use of the patent, or copyright, pending the trial, which would enable the award of proper compensation in the event of the plaintiff succeeding in the action.

In short, the court may in any proper case impose terms or require undertakings as a condition of granting or withholding an injunction, so as to protect the rights of the parties pending the trial, and also to secure adequate compensation for loss of intermediate profits to a plaintiff who ultimately succeeds.

**ART. CLXXI.—*Undertaking as to Damages.***

In granting an interlocutory injunction pending the determination of the rights of the parties at the trial, it is usual for the court to require an undertaking by the plaintiff to abide by any order which the court may subsequently make as to the payment of damages sustained by the defendant owing to the granting of such injunction.

This undertaking by the plaintiff as to damages ought, as a rule, to be given whenever an interlocutory injunction is granted, unless such injunction is in the nature of a final order. The object is to secure to the defendant the payment of proper damages in any case where an interlocutory injunction has been granted, which, as it ultimately turns out at the trial, ought not to have been granted, or in other words to protect a defendant against the damage he may suffer by the wrongful issue of an injunction (see *Smith v. Day* (1882), 21 Ch. D. 421, at p. 424, *per JESSEL, M.R.*; *Fenner v. Wilson*, [1893] 2 Ch. 656).

But such an undertaking is not generally required when an interlocutory injunction is granted on behalf of the Crown (*Attorney-General v. Albany Hotel Company*, [1896] 2 Ch. 696).

Where an undertaking by the defendant is accepted in lieu of an interim injunction a cross-undertaking as to damages by the plaintiff will now be inserted unless it is excluded by express agreement (see Practice Note, [1904] W. N. 203; and *Oberrheinische Metallwerke v. Cocks*, [1906] W. N. 127).

When it is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to the amount of damages sustained by the defendant may be directed, even though there was no misrepresentation

or other default by the plaintiff in obtaining the injunction (see *Griffith v. Blake* (1884), 27 Ch. D. 474; *Rileys v. Mayor of Halifax* (1907), 97 L. T. 278).

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#### ART. CLXXII.—*Damages Awardable in Lieu of Injunction.*

The court has jurisdiction in its discretion to award damages in lieu of granting an injunction.

As a general rule the court will not give damages in lieu of an injunction when the injury is of a material or substantial nature, but will do so only when the injury is small, and is capable of estimation and adequate compensation in money, and the case is one in which it would be oppressive to grant an injunction.

Since the Judicature Act, 1873, each Division of the High Court has full power to award damages instead of an injunction. Lord Cairns's Act (21 & 22 Vict. c. 27, sect. 2) empowered the Courts of Equity to give a plaintiff damages by way of alternative relief, and this jurisdiction was preserved, notwithstanding the repeal of that statute (see Statute Law Revision Act. 1883, sect. 5), though since the wide powers conferred by the Judicature Act it is not necessary to have recourse to the jurisdiction under Lord Cairns's Act (see *Sayer v. Collyer* (1884), 28 Ch. D. 103).

The giving of damages in addition to or substitution for an injunction is entirely a matter for the discretion of the court (see *Colls v. Home and Colonial Stores, Limited*. [1904] A. C. 179, at p. 193, *per* Lord MACNAGHTEN). As a general rule, when the plaintiff establishes his legal right, in the absence of special circumstances disentitling

him to relief, an injunction to restrain an infringement will be granted (see *Martin v. Price*, [1894] 1 Ch. 276).

The circumstances under which the court is disposed to award damages in substitution for an injunction, as stated above in the general principle, are not exhaustively enumerated, but the statement must be regarded merely as a useful "working rule" which has been laid down by the Court of Appeal (see *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287, at pp. 322, 323).

Presumably, the court has jurisdiction to award damages by way of compensation for an injury which is threatened or intended but not actually committed, but this cannot be regarded as definitely settled by authority (see *Martin v. Price*, [1894] 1 Ch. 276, at pp. 284, 285).

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#### ART. CLXXIII.—*General Purposes for which Injunctions are Granted.*

The general purposes for which injunctions are granted are to protect legal or equitable rights from actual or threatened infringement.

In particular, injunctions are granted to protect rights of property, to enforce contracts, to prevent breaches of restrictive covenants, and to restrain other wrongful acts.

It would not be desirable, even if it were possible, to attempt an exhaustive enumeration of the various rights the infringement of which may be restrained by injunction, and for the protection of which, therefore, injunction affords an appropriate remedy. It is sufficient here to outline the main heads upon which the exercise of the

jurisdiction to grant injunctions is most frequently called for. The object or purpose of the majority of injunctions granted by the courts is undoubtedly the protection of proprietary rights. Under this head may be instanced injunctions to restrain waste, trespass, nuisance ; to prevent the infringement of easements such as rights to light, air, and water ; to protect rights of property in patents, copyright, trade-marks, etc. The unauthorised publication of information obtained under express or implied promise of secrecy, of unpublished manuscript, or of private correspondence, is restrainable by injunction. So also are acts which constitute breaches of covenants which, under the doctrines of equity, are deemed to run with the land, or breaches of negative stipulations in contracts. An important branch of the jurisdiction is the enforcement of contract by means of injunction. In appropriate cases an injunction may be granted in lieu of or as ancillary to a decree of specific performance.

For the purpose of restraining illegal or unauthorised acts, or for the protection of property, injunctions may, in appropriate cases, be obtained against corporations (*Davies v. Gas Light and Coke Company*, [1909] 1 Ch. 248), trade unions (see *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] A. C. 426), committees of clubs, and other societies, trustees, executors, mortgagors, mortgagees, and partners.

Lastly, numerous wrongful or tortious acts not comprised under the various heads already mentioned may be restrained by means of injunction. It is not necessary in a text-book on Equity to advert to these, but the jurisdiction to restrain libel and slander by injunction ought to be briefly noticed. Since the Judicature Act, injunctions have frequently been granted to restrain libel (see *Monson v. Tussauds*, [1894] 1 Q. B. 671), and even slander (see *Hermann Loog v. Bean* (1884), 26 Ch. D. 306). It is, indeed, now well settled that an injunction may be granted to restrain the publication or repetition of a libel or slander, whether affecting property, trade, or merely personal reputation. In this class of case an injunction may be granted either at the trial of the action to restrain

any further publication of the libel or slander, or on an interlocutory application before the trial. But an interlocutory injunction to restrain libel or slander will only be granted in the clearest cases, that is, in cases where the matter complained of is so clearly libellous that a verdict of a jury to the contrary would be set aside as unreasonable (see *Bonnard v. Perryman*, [1891] 2 Ch. 269).

Injunctions have of recent years been frequently granted to restrain trade libel and slander of title. But, in cases of this type involving the disparagement of a trader's goods special damage is essential to the cause of action, and unless it be proved an action for defamation is not maintainable, and an injunction will not be granted. In the case of *White v. Mellin*, [1895] A. C. 154, the plaintiff, without averring that he had sustained any damage, claimed an injunction to restrain statements alleged to be disparaging to his goods. It was held that he was not entitled to an injunction, and it was pointed out that damages and injunction are merely two different forms of remedy against the same wrong, and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. Lord WATSON, indeed, stated that "the onus resting upon a plaintiff who asks an injunction and does not say that he has as yet suffered any special damage, is, if anything, the heavier, because it is incumbent upon him to satisfy the court that such damage will necessarily be occasioned to him in the future" (*ibid.*, at p. 167). This would seem to indicate that under some circumstances an injunction might be granted before special damage has been sustained. But a later decision of the House of Lords clearly establishes that an injunction will be refused in cases of slander of title unless special damage be alleged and proved (*Royal Baking Powder Company v. Wright, Crossley and Company* (1900), 18 R. P. C. 95). False statements of fact in relation to the personal character or conduct of any parliamentary candidate made for the purpose of affecting his return may be restrained by interim or perpetual injunction, and in such a case, for the purpose of granting an interim injunction, *prima facie* proof of the falsity of

the statement is sufficient (see *Corrupt and Illegal Practices Prevention Act, 1895* : *Sunderland Election Petition* (1896), 5 O'M. & H. 53).

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#### ART. CLXXIV.—*Waste.*

(1) Any act or omission by a tenant for life or certain other limited owners which involves a material alteration of, and is prejudicial to, the inheritance, is technically termed “waste.”

(2) Waste is either “voluntary,” e.g., the destruction of buildings, removal of fixtures, cutting timber, opening mines ; or “permissive,” e.g., allowing buildings to fall into disrepair. Voluntary waste may be restrained by injunction, but an injunction will not be granted to restrain permissive waste.

(3) A tenant for life who under a settlement is unimpeachable of waste may legally do acts which would otherwise amount to waste, but he may not commit “equitable waste,” that is, such waste as would formerly have been restrained by the Court of Chancery on the ground that the tenant for life was making an unconscientious use of his legal powers.

Equitable waste may be restrained by injunction.

(4) Any person may apply for an injunction to restrain waste who would be prejudiced by the waste if committed.

## PARAGRAPH (1).

Tenants for life, or for years, unless by the terms of the settlement they are unimpeachable of (*i.e.*, not liable for) waste, may by injunction be restrained from doing any acts amounting to waste. An incumbent is in the same position as a tenant for life impeachable for waste, except where his disability has been removed by the Ecclesiastical Commissioners under their statutory powers (see *Ecclesiastical Commissioners v. Wodehouse*, [1895] 1 Ch. 552).

Any alteration of the inheritance was formerly regarded as waste. Thus the conversion of pasture into arable land, or of wood into pasture, was waste, and as such was formerly restrained by injunction (see Coke, Lit. 53A; *Lord Darcy v. Askwith* (1617), Hob. 234). In modern law, however, it is established that no act can be waste which is not injurious to the inheritance, either by diminishing the value of the estate, or by increasing the burden upon the estate, or by impairing the evidence of title (*West Ham Central Charity Board v. East London Waterworks*, [1900] 1 Ch. 624, at p. 636). In *Doherty v. Allman* (1878), 3 App. Cas. 709, the court refused to grant an injunction to restrain a lessee from converting certain store buildings, which were in disrepair, into dwelling-houses, which would increase the value of the premises. And it is now well settled that no act will be restrained by injunction as waste unless it is prejudicial to the inheritance, and what has been termed “ameliorating waste” will not be restrained (*Meux v. Cobley*, [1892] 2 Ch. 253).

## PARAGRAPH (2).

At common law the cutting of timber, or of trees which would become timber, by a tenant for life, except periodical cutting on a timber estate, was waste. By “timber” is technically meant oak, ash, and elm, at least twenty years old, and such other trees as by local custom are regarded as timber (*Dashwood v. Magniac*, [1891] 3 Ch. 306).

Under the Settled Land Act, 1882, sect. 35, a tenant for life impeachable for waste is empowered to cut and sell timber on the settled land which is ripe and fit for cutting, with the consent of the trustees, or under order of the court. Three-fourths of the net proceeds of sale are to be set aside as capital money arising under the Act, and the other fourth part is to go as rents and profits.

The opening of new mines or quarries by a tenant for life amounts to waste, but where mines or quarries have already been opened and worked a tenant for life may continue working them and take the profits (see *Elias v. Snowden Slate Quarries Company* (1879), 4 App. Cas. 454; *Greville-Nugent v. Mackenzie*, [1900] A. C. 83).

Under the Settled Land Act, 1882, sects. 6—11, a tenant for life may grant mining leases not exceeding sixty years in length, and is entitled if impeachable for waste to one-fourth, or, if unimpeachable, to three-fourths of the rent of such mining leases, the residue of the rent being set aside as capital money arising under the Act.

Permissive waste by a tenant for life will not be restrained by injunction, nor can a remainderman recover damages in respect of it (*In re Parry and Hopkin*, [1900] 1 Ch. 160).

#### PARAGRAPH (3).

A tenant for life "without impeachment of waste" would, notwithstanding his wide powers, be restrained in equity from the commission of certain acts of waste, upon the principle that such acts would constitute an unfair and unconscientious use of his powers. For instance, a tenant for life unimpeachable for waste might, quite apart from the modern statutory powers, legally cut and sell timber. But he would not be allowed, without special reason, to cut down ornamental trees or timber, and any such attempt to exercise his legal powers would be restrained as "equitable waste." In *Vane v. Lord Barnard* (1716), 2 Vern. 738, the tenant for life, though not impeachable for waste, was, upon the ground that he was using his legal powers

unfairly, restrained from taking off the roof of Raby Castle in order to spite the remainderman. A tenant for life may, however, cut timber and retain the proceeds, when, though ornamental, it is injurious to adjoining trees (*Baker v. Sebright* (1879), 13 Ch. D. 179).

The Judicature Act, 1873, sect. 25 (3), enacts that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. An injunction may be granted to prevent any threatened or apprehended waste under sect. 25 (8) of the same Act.

#### PARAGRAPH (4).

Any person whose estate or interest would be prejudiced by the waste which it is sought to restrain is entitled to an injunction. Any reversioner or remainderman, whether the owner of the inheritance or merely entitled to a life estate, may sue to restrain waste. An injunction may be granted at the instance of trustees to preserve contingent remainders to prevent waste by a tenant for life and a remote remainderman in collusion (*Garth v. Cotton* (1753), 3 Atk. 751). And a private individual may apply for an injunction to restrain the pollution of a river passing through his land by local authorities, even though these have a statutory right to discharge sewage into their sewers (*Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393).

In all cases of actions for the prevention of waste, one person may sue on behalf of himself and all persons having the same interest (Order 16, rule 37).

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ART. CLXXV.—*Trespass.*

An injunction may be granted to restrain any threatened or apprehended trespass to land, or to prevent the continuance or repetition of any such trespass.

Formerly the circumstances under which the court would exercise jurisdiction in granting injunctions to restrain trespass varied according to whether the plaintiff was in or out of possession, or the defendant was merely a trespasser, or a claimant under an adverse title.

Now, under s. 25 (8) of the Judicature Act, 1873, if an injunction is asked either before, or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable.

An injunction to restrain a trespass is in aid of a legal right. Where the right is clear, and serious injury likely to accrue from its infringement, the court will usually grant an injunction pending the determination of the right. When there is serious doubt as to the legal right or its infringement, and irreparable injury is not likely to result, an injunction may still be granted if the balance of convenience is in favour of it, but not otherwise.

An injunction will usually be granted to restrain the continuance or repetition of a trespass. For example, a continued trespass by the improper use of a highway has been restrained (see *Hickman v. Maisey*, [1900] 1 Q. B. 752). An injunction will be granted to restrain a trespass by interference with a right to abstract water from a stream

(*Whitmore's, Limited v. Stanford*, [1909] 1 Ch. 427). So an injunction has been granted to restrain a newspaper reporter from trespass by attending meetings of the council of a municipal borough without the consent of the council (*Mayor, etc. of Tenby v. Mason*, [1908] 1 Ch. 457). But where there has been a mere trespass which is not continuing, and the repetition of which is not threatened, an injunction will not generally be granted (*Behrens v. Richards*, [1905] 2 Ch. 614).

For an instance of damages being awarded in lieu of an injunction to restrain trespass, see *ibid.*

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#### ART. CLXXVI.—*Nuisance, Infringement of Easements, etc.*

(1) An injunction may be granted to restrain a nuisance, causing material injury or annoyance, for which damages would not afford adequate compensation, and especially when the nuisance is of a continuing or permanent nature.

(2) In particular an injunction may be granted to restrain a nuisance arising from the infringement of a proprietary right or easement, such as rights relating to air, light, water, ways, support, etc., and in such a case an injunction may be granted even when no damage has been sustained, if the circumstances are such that an adverse right might be acquired by the continuance or repetition of the acts sought to be restrained.

##### PARAGRAPH (1).

A public nuisance, such, for example, as interference with or improper user of a highway, may be restrained by

injunction at the suit of the Attorney-General (see *Attorney-General v. Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276). A private individual may sue for an injunction to restrain a public nuisance only when he has thereby sustained some special damage. Thus, an injunction has been granted at the suit of a private person to restrain a nuisance caused by the ringing of bells of a Roman Catholic chapel, which occasioned disturbance and annoyance to the plaintiff, who resided next door (*Soltan v. De Held* (1851), 2 Sim. (n.s.) 133). A public nuisance caused by the carrying on of a noxious trade, such as that of a fat-melter, may be restrained by injunction, even though the business is carried on in a proper manner (*Attorney-General v. Cole and Son*, [1901] 1 Ch. 205).

In the case of a private nuisance, an injunction may be obtained when the nuisance is of such a nature as to cause substantial injury, or inevitable risk to property, or health, or some material interference with the ordinary comfort of life.

The court will not, as a rule, restrain by injunction a nuisance of a merely temporary or occasional character (see *Harrison v. Southwark and Vauxhall Water Company*, [1891] 2 Ch. 409). When the nuisance affects property, an injunction will not be granted in the case of a trivial or slight injury. The nuisance must be such as to support an action for damages, and must be material; some actual and substantial damage must have been sustained (*Kine v. Jolly*, [1907] A. C. 1). It was held by the House of Lords, in the case of *St. Helens Smelting Company v. Tipping* (1865), 11 H. L. C. 642, that in an action for a nuisance based on an alleged injury to property caused by noxious vapours from smelting works, the injury to be actionable must be such as visibly to diminish the value of the property, and in such a case the circumstance that the locality is a manufacturing district must be considered. A serious and continuing nuisance causing substantial injury to property, e.g., vibration and noise caused by works of the defendant, which cannot adequately be compensated by damages, will be restrained by injunction (see *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287).

A nuisance interfering with the ordinary comfort and enjoyment of life or property is restrainable, even though no direct injury or actual risk to health can be proved, when there is a reasonable apprehension of risk to health or interference with the enjoyment of property (see *Tod-Heatley v. Benham* (1889), 40 Ch. D. 80 ; see also *Price's Patent Candle Company v. London County Council*, [1908] 2 Ch. 526, in which case the erection of a pumping station in circumstances amounting to a nuisance, and, possibly also, trespass, was restrained by injunction). Upon these principles injunctions have been granted to restrain the following nuisances : the erection of a hospital for infectious diseases in a residential neighbourhood (*Metropolitan Asylums District v. Hill* (1881), 5 App. Cas. 193 ; cf. *Attorney-General v. Corporation of Nottingham*, [1904] 1 Ch. 673) ; carrying on noxious, offensive, or dangerous trades or businesses ; vibration and noise caused by an electric generating station ; obstruction of access to premises by acts causing crowds to collect ; illegal acts in connection with strikes or trade disputes, such as illegal picketing ; interference in the lawful exercise of a trade or business, as by combining to induce persons to break contracts, to leave employment, or to remove their custom (*Quinn v. Leathem*, [1901] A. C. 494 ; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88).

In a recent case it was held that an injunction will be granted to restrain noise made by printing machinery only if it amounts to a nuisance, having regard to the neighbourhood and to previously existing noises (*Polsue and Alfieri, Limited v. Rushmer*, [1907] A. C. 121).

#### PARAGRAPH (2).

The infringement of rights, whether natural rights or rights which have been acquired as easements, relating to air, light, ways, water, or support of land or buildings, constitutes a wide class of nuisances for the prevention of which injunction affords the appropriate remedy. In illustration of acts which have been restrained by injunction

under this head the following cases may be referred to: interference with the access of air to a window or with a current of air passing through a defined channel (*Aldine v. Latimer, Clark, Muirhead and Company*, [1891] 2 Ch. 437; *Chastey v. Ackland*, [1897] A. C. 155); interference with the purity of air by chemical or other works causing noxious fumes, smoke, or smell (*Sanders-Clark v. Grosvenor Mansions Company*, [1900] 2 Ch. 373); interference with ancient lights by the erection of buildings, hoardings, etc. (*Kine v. Jolly*, [1907] A. C. 1; *Duker-son v. Connelly*, [1907] 1 Ch. 678); obstruction of rights of way (*Gardner v. Hodgson's Kingston Brewery Company*, [1903] A. C. 229); interference with the flow or purity of a stream of water which either causes actual damage to a riparian owner, or is likely to found a claim which may ripen into an adverse right (*John Young and Company v. Bankier Distillery Company*, [1893] A. C. 690; as to an injunction to restrain the pollution of a river by sewage by a corporation, see *Earl of Harrington v. Corporation of Derby*, [1905] 1 Ch. 205); disturbance of rights of support by excavation, removal of buildings, etc., causing subsidence of land or buildings (*Buckhouse v. Bonomi* (1861), 9 H. L. C. 503; *Dalton v. Angus* (1879), 6 App. Cas. 740; *Trinidad Asphalt Company v. Ambard*, [1899] A. C. 594). Thus in *Butterley Company v. New Hucknall Colliery Company*, [1908] 2 Ch. 475, an injunction was granted to restrain the defendant company from so working a seam in their coal-mine as to cause subsidence to the plaintiff company's seam (see also *Butterknowle Colliery Company v. Bishop Auckland Industrial Co-operative Company*, [1906] A. C. 305). Nuisances caused by acts interfering with rights to markets, ferries, and other franchises, are also restrainable by injunction. The remedy by injunction may be invoked to prevent an invasion of proprietary rights, such as rights of market, whether newly created or merely confirmed by statute, unless that remedy is expressly or impliedly excluded by such statute (see *Stevens v. Chown*, [1901] 1 Ch. 894).

ART. CLXXVII.—*Patents.*

(1) In an action for the infringement of a patent, an interlocutory injunction may be granted for the protection of the patentee pending the trial, and, after the validity of the patent has been established, a perpetual injunction may be granted to restrain any future infringement.

(2) In an action to restrain the continuance of threats of legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of an invention, by a person claiming to be a patentee of such invention, an injunction may be granted to restrain the continuance of such threats, unless such person with due diligence commences and prosecutes an action for infringement of his patent.

## PARAGRAPH (1).

The grant and registration of letters-patent for inventions is now regulated by the Patents and Designs Act, 1907. In an action for infringement of a patent the court may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms, and give such directions respecting the same, and the proceedings thereon, as the court may see fit (Patents and Designs Act, 1907, sect. 34). An applicant for a patent is not entitled to institute any proceeding for infringement until a patent for the invention has been granted to him (see *ibid.*, sect. 10). But after the acceptance of a complete specification, and until the date of sealing a patent in respect thereof; the applicant has the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification (*ibid.*).

An interlocutory injunction may be granted in aid of the legal right in order to protect the patent from infringement pending the trial of the legal right to the patent. An infringement being proved, an interlocutory injunction will usually be granted when the validity of the patent has been established in a previous action or is not in issue, or when the patent is an old one, and it has long been uninterruptedly enjoyed (see *Dunlop Pneumatic Tyre Company v. Hubbard Patents and Tyre Syndicate* (1902), 19 R. P. C. 546). On the other hand, if the patent is a new one and not established by judgment, the court will rarely grant an interlocutory injunction with regard to it (see *Spencer v. Holt* (1903), 20 R. P. C. 142). Generally, when the defendant is willing and undertakes to keep an account of profits pending the trial of the action for infringement of the patent, an interlocutory injunction will not be granted. On the grant of an interlocutory injunction in patent cases it is the practice for the court to require the plaintiff to give an undertaking to abide any subsequent order of the court as to payment of damages to the defendant.

After the validity of a patent has been established at the trial, the patentee is entitled to a perpetual injunction to restrain any future infringement during the continuance of the patent. But an injunction would be refused when there is no probability of any repetition of the infringement (see *Proctor v. Bayley* (1889), 42 Ch. D. 390). An injunction to restrain infringement would not be granted when the patent has expired before the trial (*Saccharin Corporation v. Quincey*, [1900] 2 Ch. 246), nor, as a rule, when the patent is just about to expire (see *Welsbach Incandescent Gas Light Company v. New Incandescent Gas Lighting Company* (1900), 17 R. P. C. 237), for in such cases the remedy by damages is regarded as sufficient.

The Patents and Designs Act, 1907, exempts a person who infringes a patent from liability to damages if he can prove that at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, but this provision in no way affects any proceedings for an injunction (sect. 33).

## PARAGRAPH (2).

The remedy in the case of groundless threats of legal proceedings concerning the user of a patent is by injunction. Section 36 of the Patents and Designs Act, 1907, enacts that "where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings, or liability, in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent" (see *Craig v. Dowding* (1908), 98 L. T. 231).

A letter to a third party threatening litigation has been held to be a threat within the meaning of this section, which entitled the patentee to an injunction (*Douglass v. Pintsch's Patent Lighting Company*, [1897] 1 Ch. 176). It has been held that threats of legal proceedings for infringement of patent rights are none the less "threats" within the meaning of the enactment because made in answer to the infringer or to a third person (*Skinner and Company v. Shew and Company*, [1893] 1 Ch. 413).

An injunction may be granted to restrain the publication of a libel or slander of title even when no damage has actually accrued to the owner of the patent, provided that damage is imminent, and likely to follow as the natural and direct result of the defamation of title (*Dunlop Pneumatic Tyre Company v. Maison Talbot* (1904), 52 W. R. 254).

ART. CLXXVIII.—*Copyright.*

Infringements of copyright in any original literary, dramatic, musical, or artistic work may be restrained by injunction.

The law of copyright is now regulated by the Copyright Act, 1911.

This is not the place to give a sketch of the new law of copyright which is now pure statutory law. There are many special treatises, short and long, on the subject. But the following points should here be mentioned. A more thorough discussion of them may be found in the introduction to Strahan and Oldham's edition of the Copyright Act, 1911.

1. The term "copyright" now covers the right to reproduce in material form an original literary, dramatic, musical or artistic work, or any substantial part of it, to perform or, in case of a lecture, to redeliver the work, to produce any translation of the work, to convert a dramatic work into a novel, or a novel into a dramatic work, or in case of a literary, dramatic or musical work to make any contrivance whereby it may be mechanically performed or delivered (sect. 1).
2. Copyright now attaches to the work from the time it is created, not as formerly from its publication (sect. 1).
3. The term of copyright in published works is now extended to the life of the author and fifty years after his death, subject to this, that where the author has sold his copyright it will result back to his personal representative at the end of twenty-five years after his death; but such copyright shall not be infringed by the publication of the work by a person who has given notice of his intention to publish it, and has tendered the persons entitled a royalty of 10 per centum on the published price (sect. 3).

4. The term of copyright in works not published during the author's life is until they are published and fifty years after, and the copyright seems to be in his personal representative unless he has alienated it during his life, or he has bequeathed the manuscript by his will (sect. 17).

5. Copyright, or even a licence to publish, can only be assigned or granted in writing signed by the owner of the copyright (sect. 5).

6. Actions for infringement must be brought within three years after the infringement (sect. 10).

7. An injunction cannot be granted to restrain infringement of the new copyright given in architectural works (sect. 9).

8. Registration at Stationers' Hall is no longer made a condition precedent to the right to bring an action for infringement of copyright.

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#### ART. CLXXIX.—*Unauthorised Publication of Information, etc.*

The unauthorised publication of any unpublished manuscript, or of private correspondence, or of any trade secrets, or other information, acquired confidentially, may be restrained by injunction.

The Copyright Act, 1911, expressly abolishes common law rights so far as copyright is concerned—if any such rights ever existed—but it also expressly reserves all rights and jurisdiction to restrain breaches of trust and confidence (sect. 31).

Formerly it was on the ground of breach of confidence that the publication or other improper use of private

letters was restrained on application of the writer or his personal representatives (see *Pope v. Curl* (1741), 2 Atk. 341; *Earl of Lytton v. Devey and Swan Sonnenschein and Company* (1884), 52 L. T. 121). Now, however, since copyright is given to unpublished literary work, and such copyright cannot be transferred except by written assignment (see *supra*, p. 452), it is no longer necessary to rely on this ground. The publication may be restrained as an infringement of copyright.

The old rule, however, as to breach of confidence has still many applications outside the Copyright Act. Thus, the publication of lectures delivered by a University professor to students in his class-room has been restrained upon the ground that such delivery of the lectures was not equivalent to a communication of them to the public, and that the lecturer was entitled to restrain their unauthorised publication (*Caird v. Sime* (1887), 12 App. Cas. 326).

Publication of information obtained under circumstances of confidencee, as where persons in the course of employment obtain information, or where information is acquired under an express or implied promise not to divulge or make use of it, will be restrained (see *Lamb v. Evans*, [1893] 1 Ch. 218). Thus, where a person apprenticed to, and in the employment of, a firm of engine-makers acquired certain trade secrets, and, without their consent, in breach of confidence, compiled a table of dimensions of various types of engines, they were granted an injunction restraining him from publishing or communicating the table or its contents to any one (*Merryweather v. Moore*, [1892] 2 Ch. 518). In *Robb v. Green*, [1895] 2 Q. B. 315, where a person employed as manager of a business surreptitiously copied a list of names and addresses of customers, with the object of soliciting orders from them after he had set up a similar business of his own, which he subsequently did, it was held that his conduct was a breach of an implied term in his contract of service, and he was restrained by injunction from using information so obtained by him (see also *Kirchner and Company v. Gruban*, [1909] 1 Ch. 413, at p. 422). In *Exchange Telegraph Company v. Central News*, [1897] 2 Ch. 48,

a subscriber to a news agency who had acquired news and information on condition of not communicating the same to third parties, was restrained by injunction from acting in breach of his contract, and a third party was restrained from inducing a subscriber to break his contract by supplying him with such information for publication (see also *Exchange Telegraph Company v. Gregory and Company*, [1896] 1 Q. B. 147).

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#### ART. CLXXX.—*Trade Marks, Trade Names, etc.*

An injunction may be granted to restrain an actual or threatened infringement of a registered trade mark, or to restrain a trader from passing off his goods as the goods of another person, or to restrain such an infringement of a trade name applied to a business or goods as would be calculated to deceive and cause damage.

A trade mark has been defined as a symbol applied or attached to goods so as to distinguish them from similar goods, and to identify them as the goods of a particular trader, or of his successors in business (see *Leather Cloth Company v. American Leather Company* (1863), 4 De G. J. & S. 137, at p. 142).

The Trade Marks Act, 1905, sect. 3, rather more widely defines a “trade mark” as “a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.”

The right to a trade mark may be acquired by public user, or, since 1875, by registration. Formerly the right could only be acquired by actual public user of the trade mark. The Trade Marks Registration Act, 1875, introduced a system of registration, which is now regulated by the Patents, Designs and Trade Marks Acts, 1883 to 1905.

Application for registration of a trade mark is deemed to be equivalent to public use of the trade mark. The registration of a person as proprietor of a trade mark is *prima facie* evidence of the validity of the original registration of such trade mark, and is, after the expiration of seven years from the date of the original registration (or seven years from the date of the passing of the Trade Marks Act, 1905, whichever shall last happen) to be taken to be valid in all respects unless the registration were obtained by fraud. This provision, therefore, became operative only after August 11th, 1912. Under sect. 76 of the Act of 1883, registration, after the expiration of five years, was conclusive evidence of the right to the exclusive use of a trade mark (sect. 41 of Act of 1905).

Registration is a condition precedent to an action for infringement of a registered trade mark, sect. 42 of the Act of 1905 providing that a person shall not be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered trade mark unless such trade mark was in use before August 13th, 1875, and has been refused registration under the Act of 1905. Only certain classes of marks which comply with certain particulars are capable of being registered as trade marks (see sects. 8—11 of the Act of 1905 as to what are registrable trade marks; see also *Eastmans' Photographic Materials Company's Application*, [1898] A. C. 571; *In re Gestetner's Trade Mark*, [1908] 1 Ch. 513): and a trade mark must be registered for particular goods or classes of goods (sect. 8 of the Act of 1905).

It is, however, important to observe that, notwithstanding these enactments, any distinctive symbol applied or attached to goods by a trader may by user become a trade mark, which, even though incapable of being registered, may nevertheless be protected from infringement by injunction in an action for "passing off." In short, the rights of a trader legally entitled by user to a trade mark exist apart from, and are not prejudicially affected by, registration of the trade mark. It follows, therefore, that if he has acquired a right to a trade mark as to a certain class of goods, and the trade mark as registered is confined to a part of that class of goods, he is entitled to protection

by injunction for the whole class of goods (see *Jay v. Ladler* (1888), 40 Ch. D. 649).

The right to a trade mark is infringed by the unauthorised use of the actual mark itself, or of such a colourable imitation of it as is calculated to deceive, and to lead purchasers to believe they are buying the goods of the proprietor of the trade mark. "There is," it was stated by Lord WESTBURY, L.C., "no exclusive ownership of the symbols which constitute a trade mark, apart from the use or application of them; but the word 'trade mark' is the designation of these marks or symbols as and when applied to a vendible commodity" (*Leather Cloth Company v. American Leather Cloth Company* (1863), 4 De G. J. & S. 137, at p. 142). In *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376, the House of Lords held that where the first producer of a manufactured article has identified with it a particular name, whether his own name, or a name which is a word descriptive of the article itself, such a name becomes a trade mark, the adoption or employment of which by another person in advertising a similar article would constitute a wrongful invasion of a right of property which may be restrained by injunction.

Though many decisions have thus based the jurisdiction in injunction in trade mark cases on the protection of a proprietary right, the prevention of fraud or fraudulent misrepresentation has more recently been asserted as the true foundation of the jurisdiction. In his judgment in *Reddaway v. Banham*, [1896] A. C. 199, Lord McNAGHTEN expressed the opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to this, that he must not make directly, or through the medium of another person, a false representation that his goods are the goods of another person (*ibid.*, at p. 216). In the words of Lord HALSBURY, L.C., "nobody has any right to represent his goods as the goods of somebody else" (*ibid.*, at p. 204).

Whether, indeed, the protection of property or the prevention of fraud be the true basis of jurisdiction, the appropriate remedy in cases of infringement of trade marks is by injunction. When an action for infringement is commenced it is usual for an interim injunction to be applied for to restrain the defendant until the hearing from continuing the infringement. Leave may be obtained to serve the notice of motion for an injunction with the writ in the action under Order 52, rule 9, or it may be served on the defendant after appearance.

The injunction may be framed to restrain the use by the defendant of the particular trade mark or of any colourable imitation thereof, in connection with goods of the class in respect of which the trade mark is registered, or generally to restrain the defendant from infringing the plaintiff's registered trade mark (*Montgomery v. Thompson*, [1891] A. C. 217), or to restrain him from using a mark or word in such a way as to represent his goods as the goods of the plaintiff (*Slazenger and Sons v. Feltham and Company* (1889), 6 R. P. C. 531).

An interim injunction will be granted or refused according to the "balance of convenience." It may, for instance, be refused where it is uncertain whether there has been an infringement, or where the plaintiff's right to the trade mark is in question.

An injunction is obtainable when there is evidence of a threatened or contemplated infringement, as well as in cases of actual infringement.

In order to obtain an injunction to restrain an infringement of a trade mark, it is not necessary to prove any fraudulent use of the mark by the defendant or that he had any intention to mislead. An injunction will be granted against the use by one trader of the trade mark of another, although such use may have been in ignorance of the plaintiff's right to the trade mark (*Millington v. Fox* (1838), 3 My. & Cr. 338).

An injunction to restrain the infringement of a registered trade mark cannot be brought in the county court (*Bow v. Hart*, [1905] 1 K. B. 592).

Apart altogether from any question of infringement of a registered trade mark, an action will lie for an injunction to restrain a trader from "passing off" his goods as those of another. In order to obtain an injunction in this class of case there must either be evidence of a fraudulent intent to deceive, or alternatively evidence that the conduct of the defendant (*e.g.*, owing to similarity of the "get-up" of the goods, resemblance of the symbols, marks, or names, etc.) is such as to be calculated to deceive buyers (see *Singer Manufacturing Company v. Loog* (1880), 18 Ch. D. 395, at p. 412; 8 App. Cas. 15; *Payton and Company v. Snelling, Lampard and Company*, [1901] A. C. 308).

A trader will be restrained from passing off his goods as the goods of another trader by selling them under a name which is likely to deceive immediate or ultimate purchasers into the belief that they are buying the goods of that other trader. Upon this principle, in *Reddaway v. Banham*, [1896] A. C. 199, where the plaintiff had for some years made and sold goods as "Camel Hair Belting," which name in the trade designated the plaintiff's goods only, he was held to be entitled to an injunction restraining the defendant from using the words "camel hair" as descriptive of belting sold by him, and manufactured by persons other than the plaintiff, without clearly distinguishing such belting from the belting of the plaintiff. So, in the case of *The Birmingham Vinegar Brewery Company v. Powell*, [1897] A. C. 710, where the respondent had manufactured and sold as "Yorkshire Relish" a sauce which had become identified with that name, and the appellants sold another similar sauce under the same name, so as to induce persons to believe it was of the respondent's manufacture, an injunction was granted restraining the use by the appellants of the words "Yorkshire Relish" without clearly distinguishing their sauce from that of the respondent. In *Singer Manufacturing Company v. British Empire Manufacturing Company* (1903), 20 R. P. C. 313, the defendants were restrained from advertising or using the name "Singer" in connection with sewing machines not of the plaintiffs' make, in any way calculated to induce the belief that such machines were of the plaintiffs' manufacture, it being held that the defendants' advertisements were calculated and intended

to deceive intending purchasers into the belief that the machines advertised were manufactured by the plaintiffs. On the same principle in *Rey v. Leconturier*, [1908] 2 Ch. 715, an injunction was granted to restrain the defendants from using the name of "Chartreuse" as the name of their liqueur and from passing off their liqueur as the liqueur made by the plaintiffs.

An intention to deceive may be inferred from the circumstances of the case, and an injunction granted although there is no proof of any actual case of deception, if there be a probability of deception (*County Chemical Company v. Frankenburg* (1904), 21 R. P. C. 722). The eyesight of the judge is in the class of case grounded on colourable imitation the ultimate test (*per FARWELL, J.*, in *Bourne v. Swan and Edgar, Limited*, [1903] 1 Ch. 211, at p. 225).

On the other hand, if the probability of deception be not established, as where the get-up of the goods is not calculated to deceive, an injunction will not be granted. Moreover, where the descriptive word, the use of which is complained of by the plaintiff, is not proved to have acquired a secondary meaning so as to denote only the goods of the plaintiff's manufacture, the plaintiff will not be entitled to an injunction (*Hommel v. Bauer and Company* (1905), 22 R. P. C. 43). So in *Electromobile Company v. British Electromobile Company, Limited* (1908), 25 R. P. C. 149, an injunction to restrain the defendants from carrying on business under the name of the "British Electromobile Company" was refused, on the ground that the word "electromobile" was descriptive of a motor car driven by electricity, and had acquired no secondary meaning as indicating the motor cars of the plaintiff company only. Nor will an injunction be granted in the case of one instance only of passing off being proved when there is no proof of fraudulent intent, or of intention to repeat the act, or of damage to the plaintiff (*John Knight and Sons v. Crisp and Company* (1904), 21 R. P. C. 670).

The use of a trade name or designation applied to a business or to goods which is as a matter of fact reasonably calculated to deceive, is restrainable by injunction.

Upon this principle, where a long-established brewery company had carried on business under the name of "The Manchester Brewery Company, Limited," and a new company, without any intention to deceive, was incorporated and registered as "The North Cheshire and Manchester Brewery Company, Limited," the latter company were, upon evidence that as a matter of fact the use of that name was calculated to deceive, by injunction restrained "from using the name, style, or title of the North Cheshire and Manchester Brewery Company, Limited, or any other style or name which includes the plaintiff company's name, or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company, or in any way connected therewith" (*North Cheshire and Manchester Brewery Company v. Manchester Brewery Company*, [1899] A. C. 83; see also *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Fine Cotton Spinners' Association and John Cash and Sons v. Harwood Cash and Company*, [1907] 2 Ch. 184). The assumption of a trade name which was calculated to deceive was also restrained in *F. Pinet et Cie v. Maison Louis Pinet, Limited*, [1898] 1 Ch. 179, where a trader had adopted a business name in order to pass off boots manufactured by him as the goods of the plaintiffs, whose real name it was.

And a trader may be restrained even from using his own name, where it is such that it has become so identified with the business or goods of another as to be deceptive when used without qualification. In this respect the use of a name is on the same footing as the use of any other descriptive word. For example, Messrs. J. and J. Cash having for many years made and sold at Coventry goods known as "Cash's Frillings," etc., one Joseph Cash was restrained from carrying on in the same town the business of a manufacturer or seller of frillings, etc., under the name of "Joseph Cash and Company," or under the name of "Cash," or under any name so as to mislead (*J. and J. Cash, Limited v. Cash* (1901), 18 R. P. C. 213; see also *Fine Cotton Spinners' Association and John Cash and Sons v. Harwood Cash and Company*, [1907] 2 Ch. 184). On the same ground, in

the case of *Valentine Meat Juice Company v. Valentine Extract Company* (1900), 17 R. P. C. 673, the defendants, who had attempted to get the benefit of the old-established reputation of the plaintiffs' preparation of meat juice, and had so put their goods on the market that they would be mistaken for the goods of the plaintiffs, were restrained from carrying on business under the name of "Valentine," or offering their goods for sale under the name of "Valentine," or offering their goods for sale under any such name, or from carrying on any such business under any such name, without clearly distinguishing such business from the business of the plaintiffs.

But where there is no proof of any actual deception, or probability of deception, an injunction will not be granted. Thus in *Macmillan v. Ehrmann Brothers* (1904), 21 R. P. C. 647, the court refused to restrain the use of a name which was not the name of the plaintiff or of the defendants, there being no proof of probable deception, or that the conduct of the defendants had intercepted or was likely to intercept the plaintiff's trade. In *Dunlop Pneumatic Tyre Company v. Dunlop Motor Company*, [1907] A. C. 430, an injunction to restrain the defendant company from carrying on business on the ground of the similarity of the name to the trade name of the plaintiff company was refused, there being no proof that any one would be misled by such use and the plaintiff company not being entitled to the exclusive use of the name "Dunlop."

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#### ART. CLXXXI.—*Breach of Contract and Covenant.*

(1) The enforcement of contracts may be directly or indirectly effected by means of injunctions to restrain the breach of negative contracts, or of negative terms in contracts, for valuable consideration, whether or not in any particular case the court would decree specific

performance of the whole contract, or to restrain the breach of affirmative or positive terms in contracts for valuable consideration, of which the court would decree specific performance.

(2) An injunction will be granted to restrain the breach of a restrictive covenant or agreement entered into between vendor and purchaser of land by any purchaser taking with notice of such covenant.

#### PARAGRAPH (1).

The jurisdiction of the court in injunctions is connected with the specific performance of executory contracts in three ways. An injunction may be the instrument by which the court specifically enforces the contract itself, or a part of it, or an injunction may be merely ancillary to the performance of the contract, or an injunction may be used to give effect to rights resulting from the non-performance of the contract. Whenever an injunction is granted to restrain the breach of any term of a contract, express or implied, the court thereby *pro tanto* specifically enforces the performance of the contract.

The breach of a negative term in a contract is usually restrainable by injunction. "If," said Lord CAIRNS, L.C., "parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance by the court of that negative bargain which the parties have made, with their eyes open,

between themselves" (*Doherty v. Allman* (1878), 3 App. Cas. 709, at p. 720).

Negative covenants by lessees restricting the user of the demised premises, etc., are frequently enforced by injunctions to restrain the breach thereof.

For example, an injunction will lie on a threat to commit a breach, and *a fortiori* on an actual breach, of a covenant by a lessee not to assign without the lessor's consent (see *McEucharn v. Colton*, [1902] A. C. 104; see also *Brigg v. Thornton*, [1904] 1 Ch. 386).

Covenants in partial restraint of trade also afford important illustration of negative contracts which are indirectly enforceable by injunction. Thus, breaches of contract not to set up or practice a particular business in a certain vicinity, or not to be in any way interested or concerned in a particular trade or business, may within certain limits be restrained by injunction. A covenant not to engage in a particular business, even though unrestricted as to space or time, may, having regard to the nature of the particular business (e.g., a manufacturer of guns and ammunition for war), be reasonably necessary for the protection of the covenantor, and therefore valid and enforceable by injunction (see *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company*, [1894] A. C. 535; *William Robinson and Company v. Heuer*, [1898] 2 Ch. 451).

In *Lumley v. Wagner* (1852), 1 De G. M. & G. 604, a decision which has been much criticised in subsequent cases, an injunction was granted to restrain the defendant from breach of the negative agreement not to sing at any other theatre than that of the plaintiff, although the positive agreement by the defendant to sing at the plaintiff's theatre was not one in respect of which specific performance could have been decreed.

In *Donnell v. Bennett* (1883), 22 Ch. D. 835, in the case of a contract for the sale of goods of which specific performance would not have been granted, an injunction was, nevertheless, granted to restrain a breach of an

express negative stipulation by the defendant not to sell to any other manufacturer than the plaintiff. So, also, in *Grimston v. Cunningham*, [1894] 1 Q. B. 125, where an actor contracted not to act in any theatre otherwise than on tour in America as a member of the plaintiff's company, he was restrained by injunction from breach of the negative stipulation. It is to be observed, however, that when the contract is one of which specific performance would not be decreed—as, for instance, a contract for hiring and service, or for the sale of goods—an injunction will not be granted to restrain a breach of it, unless it contains a negative stipulation either express or clearly implied. So, where the manager of a company contracted to give for a certain period "the whole of his time to the company's business," in the absence of any express stipulation not to give any of his time to a rival company, the Court of Appeal refused to grant an injunction to restrain him from so doing (*Whitwood Chemical Company v. Hardman*, [1891] 2 Ch. 416). And in another case of a contract of personal service the Court of Appeal held that a stipulation by the person employed to "act exclusively for his employers" does not in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, enable the employers to obtain an injunction to restrain him from entering into other employment (*Mutual Reserve Fund Life Association v. New York Life Insurance Company* (1897), 75 L. T. 528). The contracts in these two cases, it should be noted, were contracts of personal service which would not have been specifically enforced by the court, and the decisions indicate the disposition of the court in such cases not to extend the doctrine of *Lumley v. Wagner* (cited *ante*) to contracts in the absence of express negative words (see *per BUCKLEY, J., Metropolitan Electric Supply Company v. Ginder*, [1901] 2 Ch. 779, at p. 807). Moreover, it has been decided that the principle of *Lumley v. Wagner* will not be applied to agreements which, though negative in form, are in substance affirmative (*Kirchner and Company v. Gruban*, [1909] 1 Ch. 413).

The tendency of recent decisions, it has been said, is towards the view that the court ought to look at what is

the nature of the contract between the parties, that if the contract as a whole is the subject of equitable jurisdiction then an injunction may be granted in support of the contract, whether it contain, or does not contain, a negative stipulation, but that if, on the other hand, the breach of contract is properly satisfied by damages, then that the court ought not to interfere, whether there be, or be not, the negative stipulation (*Metropolitan Electric Supply Company v. Ginder*, [1901] 2 Ch. 799, at p. 808). Where a contract containing a negative stipulation provides for the payment of a certain sum as ascertained and liquidated damages in the event of a breach, the plaintiff must elect between the remedy by injunction and the liquidated damages, but cannot adopt the two remedies (*General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377).

The breach of an affirmative or positive term in a contract is restrainable when the contract is such as would be specifically enforced by the court, if the breach when committed would not be remedied or compensated by damages, or would involve a multiplicity of actions for the recovery of damages, unless, indeed, the granting of an injunction would cause possible damage to the defendant greater than any possible advantage to the plaintiff (see *Doherty v. Allman* (1878), 3 App. Cas. 709, at p. 720). In other words, the granting or refusing of the injunction in such a case is purely a matter of discretion.

An affirmative covenant may, however, be of such a character that the court, although it cannot enforce affirmatively the performance of the covenant, may in special cases interpose to prevent that being done which would be a departure from, and a violation of, the covenant (see *ibid.*). But, as we have observed, the grant of an injunction to restrain the doing of a particular thing depends on the discretion of the court, in the exercise of which the court will consider whether injury would result from the act which it is sought to restrain, and whether such injury, if any, would be adequately compensated by damages recoverable in one action (*ibid.*).

Where an agreement between a racecourse company and a canal company provided that if the racecourse should at any time be proposed to be used for dock purposes the former company should give the latter the "first refusal" thereof, it was held that the canal company were entitled to enforce their right as against the racecourse company and an intended purchaser by injunction, on the ground that the contract to give the "first refusal" involved a negative contract not to part with the racecourse to any one other than the canal company without giving them that first refusal (*Manchester Ship Canal Company v. Manchester Racecourse Company*, [1901] 2 Ch. 37). Upon this principle, where under contract with an electric supply company a consumer agreed to take the whole of the electric energy required for certain premises, for a period of not less than five years, at a rate specified, though there was no covenant by the company to supply, nor by the consumer to take, any energy, it was held that the contract was enforceable by injunction, it being in substance a contract not to take any electric energy from any one else (*Metropolitan Electric Supply Company v. Ginder*, [1901] 2 Ch. 799).

#### PARAGRAPH (2).

This rule is based upon the doctrine of *Tulk v. Moxhay* (1848), 2 Phil. 774. The principle established in that case is that a covenant or even a mere agreement, between vendor and purchaser on the sale of a portion of the vendor's land, that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law. Now by sect. 11 of the Conveyancing Act, 1911, where a purchaser does not obtain the title deeds to other land held under the same title as the land purchased, he is entitled to have indorsed a memorandum of any covenants restricting the user of such lands or giving him rights over them for the purpose of giving subsequent purchasers of such land notice of them.

The jurisdiction in granting injunctions in this type of case is to be distinguished from that which we have been considering, namely, the enforcement of contract by restraining breaches of contract. For in the case of a restrictive covenant, *e.g.*, a covenant not to erect a building, upon proof of a clear breach of the covenant, the covenantee is entitled to an injunction without the necessity of showing any damage (*Lord Manuees v. Johnson* (1875), 1 Ch. D. 673; see also *Elliston v. Reacher*, [1908] 2 Ch. 374). And, again, persons may be entitled to the benefit of, and bound by such a covenant although they were not parties to it. The covenant is enforceable against the purchaser and all subsequent purchasers taking from him with notice of it, and also as against persons taking the land from him as volunteers. An assignee of land, for instance, with notice of a restrictive covenant, is liable, and may be restrained by injunction from breach of it, as if he had been a party to the covenant, nor is it necessary to prove damage in this case (*Richards v. Revitt* (1877), 7 Ch. D. 224). So the mere occupier, or a lessee, of premises with notice of restrictive covenants is liable to an injunction to restrain any breach of the same (*Mander v. Falcke*, [1891] 2 Ch. 554; *John Brothers' Abergavenny Brewery Company v. Holmes*, [1900] 1 Ch. 188). When the benefit of a restrictive covenant has been annexed to land it passes by assignment of the land, and is presumed to run with the land in equity as well as at law, without proof of any special bargain or representation on the assignment (see *Rogers v. Hosegood*, [1900] 2 Ch. 388; see also *In re Nisbet and Pott's Contract*, [1905] 1 Ch. 390; Stra. Lead. Cas., p. 45).

It is, however, well established that this equitable doctrine is applicable only to restrictive or negative covenants or agreements, and does not extend to any affirmative covenant or agreement, such as a covenant to build, or to do any other act, or to expend money in repairs, or making roads, etc., so as to bind a purchaser taking with notice thereof (*London and South Western Railway Company v. Gomm* (1882), 20 Ch. D. 562). A restrictive condition will not be implied in the absence of

express stipulation (see *Holford v. Acton Urban District Council*, [1898] 2 Ch. 240). It has been held also that on an assignment of leaseholds the covenant by the assignee "to perform and observe" the covenants contained in the original lease does not entitle the lessee to enforce by injunction the specific performance by the assignee of the negative covenants contained in the lease (*Harris v. Boots, Cash Chemists*, [1904] 2 Ch. 376). Such a covenant to perform and observe the covenants in a lease is, it seems, not to be regarded as a negative covenant within the strict rule which binds the court to grant an injunction where a negative covenant has clearly been broken (see *per WARRINGTON, J.*, *ibid.* at p. 383).

The principle of *Tulk v. Moxhay* is not applicable to a covenant entered into by a purchaser, on the sale of the whole of a vendor's land, restricting the user of the land, it being merely personal and collateral, so that the executor of the vendor is not entitled to an injunction to restrain a breach of the covenant committed after the death of the vendor by an assign of the purchaser. The rule in *Tulk v. Moxhay* does not apply to a case in which the vendor sells his whole estate (see *Formby v. Barker*, [1903] 2 Ch. 539).

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## SECTION IV. -ACCOUNTS.

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ART. CLXXXII.—*Nature of Jurisdiction to Order Accounts.*

The court has jurisdiction to order accounts to be taken in cases of equitable claims or in aid of legal rights, and, in particular, this jurisdiction is frequently exercised in cases of trusts, administration, executorship, mortgages, and partnership.

Actions for partnership or other accounts ought to be instituted in the Chancery Division of the High Court.

The taking of accounts formed an important branch of the jurisdiction of the Court of Chancery. In the Common Law Courts no adequate machinery existed for the taking of accounts; matters of account were usually referred to arbitration, and in the old action of account at law the account was taken by auditors, which lengthened the litigation and deterred litigants (see *Ex parte Bux* (1751), 2 Ves. sen. 388). On the other hand, in the Court of Chancery the taking of accounts was formerly referred to the Masters in Chancery, and was a regular part of the jurisdiction. In matters based upon purely equitable claims, such as trusts, redemption of mortgages, or equitable waste, an order for the taking of an account

was a species of equitable relief necessarily incidental to the jurisdiction. Moreover, the Court of Chancery exercised a concurrent jurisdiction with the Courts of Law in matters of account in aid of legal claims.

*Cases in which accounts are ordered in aid of legal rights.*—Shortly, it may be stated that accounts will be ordered in aid of legal rights (1) where there are “mutual accounts” between the parties, *i.e.*, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other’s account (see *Phillips v. Phillips* (1852), 9 Hare, 471, at p. 473); (2) where the accounts are of so complicated a nature as to be incapable of proper adjustment in an action at law (see *Taff Vale Railway Company v. Nixon* (1847), 1 H. L. C. 111); (3) where a fiduciary relation exists between the parties as in cases of executorship, administration, partnership, and as between principal and agent or principal and factor, but not as between banker and customer which does not involve relation of a fiduciary character (see *Foley v. Hill* (1848), 2 H. L. C. 28); (4) in cases of fraud in which the plaintiff has been prevented from enforcing a legal right by the conduct of the defendant (see *McIntosh v. Great Western Railway* (1850), 2 Mac. & G. 74); (5) as ancillary to injunctions for the protection of legal rights, as in cases of infringement of copyright, patents, trade marks, etc., in which, as we have seen, accounts of the profits accruing from the illegal acts are frequently ordered.

*Accounts based on equitable and legal claims distinguished.*—The distinction between the cases of accounts arising out of equitable claims (*e.g.*, in trusts, redemption, or equitable waste) and accounts arising out of legal claims is still of practical importance with regard to the rules affecting :

(1) *The effect of lapse of time upon the claim.*—The right to an account based upon an equitable claim may be barred by *laches* or *acquiescence* on the part of the

defendant; in the case of a legal claim the right to an account is barred only by such lapse of time as would have barred the legal remedy (see *ante*, Art. CLIII.).

(2) *The liability of personal representatives.*—In the case of equitable claims the personal representatives of the party liable (e.g., trustee, mortgagee, or a person who has committed equitable waste) are themselves liable to account. In the case of legal claims the maxim *Action personalis moritur cum persona* applies, unless the estate of the delinquent has been enriched by property or the proceeds thereof belonging to another, in which case the amount to the extent of which the estate has been so enriched is recoverable from the personal representatives (see *Phillips v. Homfray* (1883), 24 Ch. D. 439; see also *In re Duncan*, [1899] 1 Ch. 387, at p. 391).

(3) *The allowance of interest.*—Interest upon moneys which have or ought to have been received by the defendant is allowed upon the taking of accounts in cases of purely equitable demands. So a trustee in an action by a cestui que trust for misapplication of trust funds, a mortgagor in a redemption action, or a defendant who has received proceeds of equitable waste, is usually charged with interest. But in accounts based upon legal claims only such interest is allowable as would have been allowed at law, and in such cases, therefore, interest is generally only allowable when it is due under an express contract or under a contract implied from the course of dealing or mercantile usage, or under sects. 28 and 29 of the Civil Procedure Act, 1833 (see *London, Chatham and Dover Railway Company v. South Eastern Railway Company*, [1893] A. C. 429).

This difference in the rules applicable to accounts arising out of equitable and legal claims is attributable to the principle that in dealing with legal claims the Court of Chancery followed the rules of law, whereas in purely equitable claims the court granted such relief as the nature of the case demanded in order to secure complete justice and avoid multiplicity of litigation (see *supra*, Art. CXXXIV.).

Four classes of cases in which, prior to the Judicature Acts, a suit for an account could have been maintained in equity have been judicially pointed out (see *London, Chatham and Dover Railway Company v. South Eastern Railway Company*, [1892] 1 Ch. 120, at p. 140, *per LINDLEY, L.J.*).

(1) Where the plaintiff had a legal right to have money payable to him ascertained and paid, but which right, owing to defective legal machinery, he could not practically enforce at law. Suits for an account between principal and agent, and between partners, are familiar instances of this class of case.

(2) Where the plaintiff would have had a legal right to have money ascertained and paid to him by the defendant if the defendant had not wrongfully prevented such right from accruing to the plaintiff. In such a case a court of law could only give unliquidated damages for the defendant's wrongful act, and there was often no machinery for satisfactorily ascertaining what would have been due and payable if the defendant had acted properly. A Court of Equity, however, in such a case decreed an account, ascertained what would have been payable if the defendant had acted as he ought to have done, and ordered him to pay the amount. *McIntosh v. Great Western Railway Company* (1850), 2 Mac. & G. 74, is the leading authority upon this class of case.

(3) Where the plaintiff had no legal but only equitable rights against the defendant, and where an account was necessary to give effect to those equitable rights. Ordinary suits by *cestuis que trust* against their trustees and suits for equitable waste fell within this class.

(4) Combination of the above cases. The jurisdiction in equity in suits for accounts was based, therefore, either upon the absence of any legal remedy or the incompleteness of the remedy by action at law.

*Actions for Accounts.*—As we have already seen, all causes for the purpose of taking partnership or other accounts were expressly assigned to the Chancery

Division by sect. 34 (3) of the Judicature Act, 1873. Since this enactment, therefore, there being no suitable machinery for the taking of lengthy or complicated accounts in the King's Bench Division, otherwise than by reference to a special or official referee, all actions involving such accounts, which previously would have been maintainable in Chancery, should be commenced by writ in the Chancery Division (see *Leslie v. Clifford* (1884), 50 L. T. 590). An action for an account in the Chancery Division is an action for the balance found to be due after taking the account (see *Manners v. Pearson and Son*, [1898] 1 Ch. 581). But cases not involving the taking of an account, in which an action at law would have been the proper remedy, as for instance actions for debt or a balance due, or for liquidated damages, or mere cases of set-off or cross-demands, may be assigned to any division of the High Court, including the Chancery Division.

In all cases in which the plaintiff in the first instance desires to have an account taken, the writ of summons must be indorsed with a claim that such account be taken (R. S. C. 1883, Order 3, rule 8). Where a writ of summons has been so indorsed for an account, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, will be forthwith made (see Order 15, rule 1). It should also be observed that under Order 33, rule 2, the court or a judge may at any stage of the proceedings in a cause or matter direct any necessary inquiries or accounts to be made or taken, although there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. This rule, however, merely authorises the court to direct before trial accounts or inquiries which would otherwise have been directed at the trial (see *Garnham v. Skipper* (1885), 29 Ch. D. 566).

Accounts are taken at judges' chambers, and must be verified by affidavit, and must be taken and vouched in the mode prescribed by Order 33, rules 4—9. Where an account cannot be taken in the ordinary way, as, for instance, where vouchers have been lost, special directions may be given as to the mode of taking the account, and, in particular, the court may direct that the books of account shall be taken as *prima facie* evidence of the truth of the matters therein contained (*ibid.*, rule 3). In taking accounts, all "just allowances" are to be made without any direction for that purpose (*ibid.*, rule 8). See, further, as to the prosecution in chambers of a judgment, or order directing accounts, Order 55, rules 28—64.

As to ordering defaulting trustees to pay the costs of taking accounts where administration proceedings have been necessitated by their neglect to deliver accounts, see *supra*, Art. XLVI.

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### ART. CLXXXIII.—*Settled Accounts.*

Where an account is proved to have been treated by the parties as a "settled account," it will not as a rule be allowed to be reopened, or ordered to be retaken, in the absence of fraud. The plaintiff in an action for an account may, however, be given leave to "surcharge and falsify."

If fraud or mistake be proved, a settled account may be ordered to be retaken.

Stated or settled accounts are to be distinguished from accounts which are open or unsettled. An account stated is one which has been either expressly or impliedly accepted by both parties, and a settled account is one which has been accepted, or agreed to, and discharged by

the parties. Whether an account is a settled account depends on the circumstances of the particular case, and the mode of dealing of the parties, but generally when there is evidence that the parties have treated an account as settled the court will regard it as a settled account. So an account which has been delivered by one party to the other, who does not raise any objection to it within a reasonable time, is a settled account (see *Willis v. Jeruegan* (1741), 2 Atk. 251).

The fact that there has been a stated or settled account as a rule constitutes a defence to a claim for an account. The order in an action for an account usually directs that settled accounts are not to be disturbed, and gives leave to "surcharge and falsify." And even though these directions are not contained in the order for an account, the accounting party is entitled to set up settled accounts (see *Holgate v. Shutt* (1884), 28 Ch. D. 111). In an action for an account the plaintiff may "surcharge," that is, prove that an item has been omitted from the defendant's account, for which credit ought to have been given, or "falsify," that is, prove that an item has been erroneously or fraudulently inserted in the account.

In the absence of fraud a settled account will not generally be allowed to be reopened. Thus, if a settled account be impeached, and a single important error be established, the court will not order the whole account to be reopened, except in the case of fraud, but will merely give the plaintiff liberty to surcharge and falsify (see *Gething v. Keighley* (1878), 9 Ch. D. 547). On the other hand, on proof of fraud a settled account may be reopened. So accounts containing errors considerable in number and amount, whether caused by fraud or even mistake, may be ordered to be opened (see *Williamson v. Barbour* (1877), 9 Ch. D. 529). As to the reopening of a closed account in a money-lending transaction under the Money-lenders Act, 1900, see *Saunders v. Newbold*, [1905] 1 Ch. 260.

ART. CLXXXIV.—*Wilful Default.*

An account is generally limited to items which have been actually received or paid by the party directed to account, but an account may, in a proper case, be ordered to be taken on the footing of wilful default, that is to say, that the accounting party may in addition be required to account for such moneys as would have been received but for his wilful neglect or default.

An administrator, executor, or trustee, may, for instance, where the circumstances so justify, be charged with wilful neglect or default in not getting in moneys due whereby assets are lost to the estate. It is to be observed that such neglect or default may be wilful even though it may have been quite unintentional and have arisen from mere forgetfulness (see *Elliott v. Turner* (1843), 13 Sim. 477).

When it is sought to charge an executor, or trustee, or other accounting party, with loss attributable to his wilful default or breach of duty, there must be some *prima facie* evidence of such breach of duty before any declaration of liability, or even an inquiry as to liability, based upon such supposed breach of duty, will be inserted in the judgment (see *In re Stevens*, [1898] 1 Ch. 162, at p. 168, *per LINDLEY, M.R.*). The omission of executors or trustees to press for payment of trust funds or, if not paid within a reasonable time, to enforce payment by prompt legal proceedings, would usually amount to such a breach of duty (see *In re Brogden* (1888), 38 Ch. D. 546).

Where wilful default is alleged on the pleadings, and evidence of it is adduced, under the modern practice, an account on the footing of wilful default may be directed either at the hearing, or trial, or at any subsequent stage of the proceedings (*In re Symons* (1882), 21 Ch. D. 757). In the course of an ordinary administration action a case of wilful default, even though not alleged on the

pleadings, may by leave of the court be raised at any time during the action, but allegations of wilful default or fraud are usually disposed of at the hearing (see *Smith v. Armitage* (1883), 24 Ch. D. 727). A plaintiff charging wilful default must prove not only a loss but also that it was attributable to the default of the accounting party (see *In re Brier* (1884), 26 Ch. D. 238).

In an administration action when wilful default is alleged on the pleadings and one instance of it is proved, an account on the footing of wilful default will be directed, but this rule does not apply to a breach of trust (*In re Wrightson*, [1908] 1 Ch. 789; Stra. Lead. Cas. 175).

It is in practice important to recollect that in all cases in which wilful default, breach of trust, or fraud is charged, particulars, with dates and items if necessary, must be stated in the pleading (see Order 19, rule 6).

## SECTION V.—RECEIVERS.

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### ART. CLXXXV.—*Receivers and Managers.*

(1) A receiver is a person appointed by the court upon application in appropriate cases to receive income and pay debts. A receiver may be appointed to get in the assets of a business, whether carried on by an individual, or partners, or a company.

(2) A receiver may be appointed as receiver and manager to carry on a business, but unless expressly appointed as manager a receiver as such has no powers of management.

#### PARAGRAPH (1).

A receiver is, for present purposes, an individual, frequently an accountant, sometimes the liquidator of a company, appointed by the court for the benefit of all the creditors in certain cases, especially in actions by debenture-holders or mortgagees. (As to the appointment of receivers by mortgagees by deed, see *supra*, Art. CXXXI.)

The chief duties of a receiver are to take possession of the estate or property, and to collect and receive the rents or profits of land or the income of any property or of a business or undertaking, and generally to get in outstanding assets, and also, if the order appointing him so directs, to pay or discharge ascertained debts or liabilities and take proper receipts therefor.

A receiver appointed by the court is a person in a fiduciary relation, and will not, therefore, be allowed to buy any property of which he is receiver unless he obtain the leave of the court (see *Nugent v. Nugent*, [1908] 1 Ch. 546).

The person appointed receiver is regarded as an officer of the court as from the date of his appointment. His possession is the possession of the court, and any interference by any third party with such possession will be restrained by injunction and involves liability to committal for contempt of court (see *Dixon v. Dixon*, [1904] 1 Ch. 161). Any party, therefore, who claims a right or title paramount to that of the party who has obtained the appointment of a receiver ought to make an application to the court before taking legal proceedings affecting the possession for leave to do so, notwithstanding the possession of the receiver (see, for example, *Ex parte Cochrane* (1875), L. R. 20 Eq. 282).

A receiver is entitled to be indemnified out of the estate against all loss incurred in the proper discharge of his duty (see *Davy v. Scarth*, [1906] 1 Ch. 55), and he is entitled to priority in respect of his costs, charges, and expenses properly incurred (*In re Glasdir Copper Mines*, [1906] 1 Ch. 365). Before defending an action, however, he must obtain the sanction of the court, otherwise he will not be entitled to an indemnity in respect of costs so incurred (see *In re Dunn*, [1904] 1 Ch. 648). So, also, he should as a rule obtain the leave of the court before borrowing money or incurring liabilities for the purposes of a business (*In re British Power, etc., Company*, [1907] 1 Ch. 528).

## PARAGRAPH (2).

When a receiver is appointed, as is often the case, for the assets of a business which it is intended to wind up, he has, as receiver, no power whatever to carry on or manage the business. In such a case his functions are merely to receive rents and profits and get in debts, and the actual business itself must cease on his appointment.

The court, however, may, in its discretion, appoint a person to be not only receiver, but also manager, of a business which is a going concern. In practice a receiver and manager is frequently appointed to a business, whether carried on by an individual, a partnership, or a company, in order to preserve the assets and goodwill, wind up the business or undertaking, and sell it as a going concern (*In re Joshua Stubbs*, [1891] 1 Ch. 475). When such an appointment is made, the receiver and manager has power to carry into effect existing contracts, and enter into new contracts, such as contracts for sale and purchase, which may be necessary for the general conduct of the business in the way in which it is usually carried on. On the other hand, he has no power to speculate with the business (see *Taylor v. Neate* (1888), 39 Ch. D. 538).

The court appoints a manager of a business, as distinguished from a mere receiver, only with a view to a sale or realisation, for the court will not assume the permanent management of a business or undertaking (see *Gardner v. London, Chatham and Dover Railway Company* (1867), L. R. 2 Ch. 201, at p. 212). Hence if a mortgagee obtains the appointment of a receiver over property on which the mortgagor carries on business, the receiver will not be appointed as manager of the business unless the business or goodwill is expressly or by implication charged or included in the security (see *Whitley v. Challis*, [1892] 1 Ch. 64).

In a debenture-holder's action—that is, an action by debenture-holders of a company to enforce their security.

—a person may be appointed not only receiver of the property of the company, but also manager of its business and undertaking, for a limited period, when the security is in jeopardy owing to the insolvency of the company, even though the security has not “crystallised” by the debenture debt having become actually due (*In re London Pressed Hinge Company*, [1905] 1 Ch. 576).

The court, however, will not appoint a manager, as distinguished from a receiver, in the case of a company incorporated with statutory powers for the purpose of carrying on a business or undertaking of a public character or for public purposes, such as a tramway or waterworks company (*Marshall v. South Staffordshire Tramways Company*, [1895] 2 Ch. 36), though a creditor who has recovered judgment against a railway company can, under sect. 4 of the Railway Companies Act, 1867, if necessary, obtain the appointment of a manager of the undertaking (*In re Liskeard and Caradon Railway Company*, [1903] 2 Ch. 681).

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#### ART. CLXXXVI.—*Jurisdiction to Appoint Receiver.*

The court has a discretionary power to make an order for the appointment of a receiver in all cases in which it appears to the court to be just or convenient that such an order should be made.

The jurisdiction to appoint a receiver is regulated by the Judicature Act, 1873, sect. 25 (8), which provides that a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just.

The words of the statute are enabling and not obligatory, hence the appointment of a receiver is a matter of discretion in each case, and cannot be claimed as of right. So, though a receiver *may* be appointed at the instance of a legal mortgagee, he has no absolute right to a receiver, and if he has once taken possession of the mortgaged property, and assumed the consequent responsibilities, the court will not appoint a receiver to enable him to relinquish the position and liabilities of a mortgagee in possession (see *In re Prytherch* (1889), 42 Ch. D. 590).

In the same way, the appointment of a receiver at the instance of an equitable incumbrancer with a view to the protection of the security, though nothing may be immediately payable, is also a matter of discretion. Thus, the holder of a debenture creating a floating charge upon the property of a company may, when the security is in jeopardy, obtain the appointment of a receiver though there has been no default in payment (*In re London Pressed Hinge Company*, [1905] 1 Ch. 576). In such a case the real question to be considered is whether, as between the company and the debenture-holder, it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped, and it is reasonable, as between those parties, that the authority should be stopped if its continuance would injure the debenture-holder. A legal mortgagee, as was said in a recent case, may take possession simply because he chooses, and in so doing accepts the responsibility of a mortgagee in possession. But an equitable mortgagee must show good reason why the court should at his instance take possession by its receiver, and danger to the security by anticipated acts of an execution creditor is good reason (*In re London Pressed Hinge Company*, [1905] 1 Ch. 576, at pp. 582, 583).

Section 25 (8) of the Judicature Act, 1873, enabling the court to appoint a receiver whenever just and convenient, has enlarged the power of the court by enabling it to appoint receivers in cases in which previously to the Act it used not to do so (see *Cummins v. Perkins*, [1899] 1 Ch. 16, at p. 20, *per* LINDLEY, M.R.). The principles

upon which the jurisdiction of the Court of Chancery to appoint receivers was based have not, however, been altered by the Act. The court, therefore, will not appoint a receiver by way of equitable execution in any case in which before the Act it would not have had jurisdiction to do so. "We cannot," said CHITTY, L.J., "judicially hold the appointment of a receiver in a case in which no court could grant a receiver before the Act to be 'just or convenient,' within the true meaning of the Judicature Act, 1873, sect. 25 (8)" (*Holmes v. Millage*, [1893] 1 Q. B. 551, at p. 558). It follows that there is no jurisdiction to appoint a receiver at the instance of a judgment creditor by way of equitable execution in any case in which prior to the Act no court would have had jurisdiction, merely because the appointment of a receiver would be of more convenience in the particular circumstances than the ordinary modes of legal execution (see *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801).

The court has jurisdiction to appoint a receiver of property situate out of the jurisdiction (see *In re Maudslay, Sons and Field*, [1900] 1 Ch. 602).

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#### ART. CLXXXVII.—*Objects of Appointment.*

A receiver is in general appointed—

- (1) With a view to the protection of the property, and especially with the view of preserving property pending the decision of litigation regarding it; or
- 2) By way of equitable execution where legal execution is in the circumstances not available or is difficult of attainment.

*Protection of property.*—The court has a discretionary jurisdiction to appoint receivers for the protection of property from the improper acts of persons who have the legal, but not the beneficial, or only partial interests therein. Where, for example, the estate of an infant is likely to be seriously prejudiced by the acts of the infant's guardian or parent a receiver may be appointed (see *Duke of Beaufort v. Berty* (1721), 1 P. W. 703, at p. 705).

Property in the possession of trustees or executors may when necessary be protected by the appointment of a receiver, though the court will not upon slight grounds interfere with the possession of the persons in whom the legal estate is vested. A receiver may be appointed to estate in the hands of a trustee or executor in a case of necessity, where there is danger to the estate owing to improper management, breach of trust, or other misconduct, as where an executor neglects to get in the personal estate or leaves it outstanding in improper securities; so also in the case of the bankruptcy of a sole trustee or executor, and, generally, where it can be proved that the assets are in danger. But unless the assets are being wasted, a receiver will not be appointed so as to prevent an executor from exercising his right of retainer (*In re Stevens*, [1898] 1 Ch. 162, at p. 173).

On a dissolution of partnership in a proper case a receiver of the partnership business may be appointed on the application of one partner as against his co-partners (*Dary v. Scarth*, [1906] 1 Ch. 55).

The protection of property which was the subject-matter of litigation was the basis of the early jurisdiction. The Court of Chancery appointed a receiver upon the principle of preserving property pending litigation which was to decide the right of the litigant parties. In such cases the court of necessity exercised a discretion as to whether it would or would not take possession of the property by its officer, and no positive unvarying rule could be laid down as to whether the court would or

would not interfere by that kind of interim protection of the property. In all cases, therefore, where the court interfered by appointing a receiver of property in the possession of a defendant before the title of the defendant was established by decree, it exercised a discretion governed by all the circumstances of the case (see *Owen v. Homan* (1853), 4 H. L. C. 997, at pp. 1032, 1033). Since the Judicature Act the same principles are applied, and in a case of sufficient urgency the court will appoint a receiver for the protection of property which is the subject of litigation. For instance, when there is an action pending for the recovery of possession of land there is jurisdiction to appoint a receiver where the plaintiff is seeking to recover the land by a legal title and the defendant is in possession, but in exercising its discretion the court will have regard to all the circumstances of the case (see *Fowell v. Van Grutten*, [1897] 1 Ch. 64; *John v. John*, [1898] 2 Ch. 573). So where the tenant of a publichouse in breach of his agreement of tenancy closed and left the premises, thereby jeopardising the licences, in an action by the landlords for the recovery of possession, a receiver of the licences and of the rents and profits was appointed pending the litigation and given possession of the premises so far as was necessary for the preservation of the licences (*Charrington v. Camp*, [1902] 1 Ch. 386).

In an appropriate case it is possible to obtain the appointment of a receiver pending litigation regarding probate or administration, or, when necessary, to protect an estate before an administrator is appointed.

The appointment of a receiver as between mortgagor and mortgagee is a form of equitable remedy in frequent use, and is of especial importance in actions by debenture-holders for the realisation of their security. As we have already seen (*supra*, Art. CLXXXVI.), since the Judicature Act, 1873, a receiver may be appointed at the instance of a legal, as well as of an equitable mortgagee, including a debenture-holder.

The winding up of a company does not prevent the debenture-holders from realising their security, and

obtaining the appointment of a receiver or manager, though it may influence the selection of the person appointed to act in such capacity. Generally when a company is in course of being wound up by the court, and an application for a receiver is made in a debenture-holder's action, the same person is appointed to act as liquidator and also as receiver (see *In re Stubbs*, [1891] 1 Ch. 475), but a receiver previously appointed by the debenture-holders under power given by their security will not usually be displaced by the liquidator, unless the assets are such that they can be more conveniently dealt with by the liquidator (*ibid.*; see also *British Linen Company v. South American and Mexican Company*, [1894] 1 Ch. 108). Under the Companies (Consolidation) Act, 1908, sect. 162, where an application is made to the court to appoint a receiver on behalf of the debenture-holders of a company the Official Receiver may be so appointed.

*Equitable Execution.*—Receivers are frequently appointed at the instance of judgment creditors in order to obtain satisfaction of their judgments against their debtors, or, as it is usually termed, by way of “equitable execution.”

In cases where the circumstances render the ordinary forms of legal execution impossible, as where a judgment debtor has merely an equitable interest in property, such as an equity of redemption, or an equitable reversionary interest, which from its nature is not available in legal execution, a receiver may be appointed, whereby the judgment creditor will obtain the benefit of the judgment which could not have been enforced at law (*Tyrrell v. Painton*, [1895] 1 Q. B. 202). In other words, when by reason of a judgment debtor having only an equitable interest there is a legal impediment to the creditor's remedy at law, he is entitled to come to a Court of Equity, which will give him precisely the same remedy in equity as he would have obtained at law if the debtor's interest had been legal instead of equitable (see *Cadogan v. Lyric Theatre, Limited*, [1894] 3 Ch. 338, at p. 344, *per DAVEY, L.J.*).

A receiver may be appointed where an impediment exists to ordinary execution, as where the judgment debtor is outside the jurisdiction (see *Goldschmidt v. Oberrheinsche Metallwerke*, [1906] 1 K. B. 373).

It should be observed that though the appointment of a receiver is commonly known as "equitable execution" it is not strictly execution. The term "equitable execution" is misleading. It has often been used by judges, and occurs in some orders as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law: it is a taking out of the way a hindrance which prevents execution at common law (see *In re Shephard* (1889), 43 Ch. D. 131, at p. 135, *per Cotton*, L.J.). A receiver was appointed by the Court of Chancery in aid of a judgment at law, when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and, therefore, it was not execution (*ibid.*, at p. 138, *per FRY*, L.J.).

The appointment of a receiver by way of equitable execution operates as an injunction to restrain the judgment debtor from himself receiving the moneys in respect of which the receiver is appointed (see *Tyrrell v. Painton*, [1895] 1 Q. B., at p. 206; see also *Lloyds' Bank v. Medway Upper Navigation Company*, [1905] 2 K. B. 359). It has the effect of preventing the debtor from dealing with the moneys to the prejudice of the judgment creditor, and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution, or made available by any other legal process (see *In re Marquis of*

*Anglesey*, [1903] 2 Ch. 727, at p. 731, *per SWINFEN EADY, J.*).

It must, however, be remembered that a receiver cannot be appointed by way of equitable execution in cases in which, before the Judicature Act, 1873, there would have been no jurisdiction. When there is no legal impediment to obtaining the execution of a judgment in the ordinary course of law in the absence of special circumstances a receiver will not be appointed (see *Manchester, etc. Banking Company v. Parkinson* (1888), 22 Q. B. D. 173). If, therefore, legal execution be possible, the equitable remedy by receiver will not be granted merely because it would afford a convenient mode of satisfying the judgment, unless indeed by reason of the conduct of the judgment debtor legal execution is extremely difficult to effect (see *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801). Nor could a receiver be appointed in respect of any property or interest, such as the future earnings of a judgment debtor, which was not formerly available either in legal or equitable execution (*Ridout v. Fowler*, [1904] 1 Ch. 658; [1904] 2 Ch. 93). So in *Cadogan v. Lyric Theatre, Limited*, [1894] 3 Ch. 338, the court refused to appoint a receiver by way of equitable execution to receive the future profits of the business of the defendant company, such as moneys paid by the public for entrance to a theatre, though a receiver was appointed of the rents and profits of the company's lands by way of equitable execution without prejudice to the rights of any prior incumbrancers.

Under sect. 23 of the Partnership Act, 1890, on the application by summons of any judgment creditor of a partner, the court may make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same, or a subsequent order, appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money which may be coming to him in respect of the partnership (see also Order 46, rules 1A and 1B).

Order 50, rule 15A, provides that in every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment.

#### ART. CLXXXVIII.—*How Appointed.*

An order for the appointment of a receiver is made by the court either upon interlocutory application or at the trial of an action.

The application is usually made by motion, but in some special cases may be made by summons.

In proceedings commenced by originating summons a receiver may be appointed on application either in court or at chambers, at any time after service of the summons.

In cases of urgency an order for the appointment of a receiver may be made *ex parte*.

The jurisdiction to appoint a receiver by an interlocutory order is expressly asserted by sect. 25 (8) of the Judicature Act, 1873. The court has the same power with regard to the appointment of a receiver at the trial of an action as it would have upon an inter-

locutory application (*In re Prytherch* (1889), 42 Ch. D. 590).

The appointment of a receiver in the course of an action is obtained on application to the court by motion. In certain cases, however, as where the parties consent to the appointment, or where a receiver previously appointed is dead, or, for other reasons, there is a vacancy in the office, the application may be by summons at chambers.

In the case of proceedings by originating summons, *e.g.*, for administration, or foreclosure, a receiver may be appointed at any time after the service of the summons, either on application by motion in court, or by summons at chambers (see Order 55, rule 5A; *In re Francke* (1888). 58 L. T. 305).

The appointment of a receiver by way of equitable execution may be made upon an *ex parte* application when the circumstances are exceptional and the case is urgent (see *Minter v. Kent, etc. Land Society* (1895), 72 L. T. 186), but where there is no actual danger to the property such an order will not be made *ex parte* (*In re Potts*, [1893] 1 Q. B. 648).

Unless otherwise ordered security by recognisance must be given by the person to be appointed receiver, duly to account for what he shall receive as such receiver, and to pay the same as the court shall direct, and unless otherwise ordered he is to be allowed a proper salary or allowance (see Order 50, rule 16). When the appointment of a receiver at the instance of a judgment creditor is conditional upon giving security it does not effectually operate by way of equitable execution upon the personal (as distinguished from the real) estate of the judgment debtor until the receiver has given security, and unless he has completed his title by so doing he cannot compel payment of the money (see *Ridout v. Fowler*, [1904] 1 Ch. 658, affirmed by the Court of Appeal, [1904] 2 Ch. 93). On the other hand, the appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon his giving security, operates as

an immediate delivery of the land in execution (see *Ex parte Evans* (1879), 13 Ch. D. 252), the appointment of a receiver by way of equitable execution being now obtainable by a judgment creditor against the debtor's equitable interest in land, without commencing a new action or issuing a writ of *ejectus*, as was formerly necessary (*ibid.* : see also *Salt v. Cooper* (1880), 16 Ch. D. 544).

As to the procedure with regard to the passing of accounts by a receiver and the payment of balances due on accounts, see Order 50, rules 18—22.

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### CHAPTER I.

#### ASSETS.

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**ART. CLXXXIX.—*Meanings of "Assets" and of "Administration."***

For present purposes by *assets* is meant all the estate of a deceased person which is liable for the payment of his debts.

By *administration* of assets is meant the application of such assets to the payment of the

deceased person's funeral and testamentary expenses and debts, and the transfer of the balance to the persons by law entitled to it.

The term "assets," which is derived from the French *assez*, enough, is applied also to the effects of an insolvent person or company which are available for the payment of his or its debts.

*Donationes mortis causâ* are also liable for the deceased's debts on his assets proving insufficient for the payment of his debts in full. (See Stra. Property, p. 260.) But they cannot themselves be called assets, since they operate not from the deceased's death but from his delivery of them to the donees (*Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812). Thus at his death they form no part of the deceased's estate, and are only made liable for his debts for the purpose of preventing frauds on creditors.

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#### ART. CXC.—*What are Assets.*

All property which belonged to the deceased person at his death or in which he had an interest not determining with his life or over which he had a general power of appointment which he exercised by his will are assets after his death, subject to this proviso, that an estate in fee tail is after the tenant in tail's death regarded as an interest in property determining with his life, except as to specialty debts due to the Crown and as to judgment debts which have during the tenant's life been made charges on his estate.

At common law a deceased person's personality was at all times liable for his debts, and his personality of course

included his leaseholds. The liability of his pure realty was, however, partial and limited.

In the first place, his estates *pur autre vie* seem not to have been liable at all. If there was a special occupant, he, on the tenant's death, took them absolutely ; if there was none, then, on the tenant's death, they became *res nullius* until they were seised by a general occupant. In both cases the occupant took by a new title, and was not and could not be made liable for the deceased tenant's debts. This was altered by the Statute of Frauds, 1677, which made estates *pur autre vie* devisable, and enacted that if there was no devise and they went to the heir as special occupant, they were to be assets by descent to the same extent as if they were fees simple, and if there were no special occupant they should go to the executors or administrators of the deceased tenant and be assets in their hands (sect. 12). This enactment was amended by sect. 9 of 14 Geo. 2, c. 20, which declared that where the estates went to the executors and administrators they were to administer them as if they were personalty. Both these enactments are repealed and re-enacted and extended to estates *pur autre vie* in copyholds and incorporeal hereditaments by sects. 2, 3 and 6 of the Wills Act, 1837.

Legal estates were liable to the owner's debts to the Crown and judgments recovered against him which were incumbrances on the land. They were also liable for the other debts of the deceased owner where these were secured by deed in which the owner's heirs were bound—that is, the heir was liable personally for such debts to the value of the land which came to him as heir. This liability did not attach where the fee simple was equitable, and it could be defeated by the debtor devising his land away from the heir. It was extended to equitable fees simple by sect. 10 of the Statute of Frauds, and to a devisee by the Statute of Fraudulent Devises, 1830. Finally, by 3 & 4 Will. 4, c. 104, all real estate, whether copyhold or freehold, and whether corporeal or incorporeal, not devised for or charged with the payment of debts, was made assets in the hands of the heir or devisee of its late owner, to be administered in Courts of Equity for the

payment of his just debts by simple contract as well as by specialty, but debts by specialty in which the heir was bound were to retain priority over debts by specialty in which the heir was not bound and simple contract debts.

Though the words of the Act are all the deceased's "real estate," yet they do not include his estates in fee tail. These are now liable for all specialty debts due by him to the Crown (33 Hen. 8, c. 39, sect. 75) and for his judgment debts, but only for the latter when they have actually been made charges on the land during his life (Land Charges Acts, 1888 and 1900).

Before 3 & 4 Will. 4, c. 104, simple contract creditors were entitled to have the assets marshalled in their favour (see p. 518, *infra*), *i.e.*, to have the specialty debts paid primarily out of the land so as to leave as much as possible of the personality to answer their claims (*Aldrich v. Cooper* (1803), 8 Ves. 382).

Property over which a person has a general power of appointment—that is, a power to appoint to any one, including himself—is not strictly such person's property, but it is treated in many respects as if it were (see Stra. Property, p. 175). Thus when a testator exercised by his will a general power of appointment, equity treated this as having the effect of making the property so appointed the testator's own, and so assets for the payment of his debts ; and even where without expressly exercising such power he attaches to his will a residuary gift (see Under. and Stra. Inter. of Wills, p. 147), or even gives legacies which after payment of his debts his estate is insufficient to satisfy (*In re Seabrook, Gray v. Baddeley*, [1911] 1 Ch. 151), this will be held to be an execution of the power as to the whole property included in the general power, or as to so much of it as is necessary to enable the legacies to be satisfied, as the case may be. Now, by sect. 1 (2) of the Land Transfer Act, 1897, realty so appointed vests in the testator's executors. But if the deceased does not by his will exercise the general power of appointment, the property over which it subsisted belongs to the persons who are to take in default of appointment, and does not

form any part of the deceased's assets (*Holmes v. Coghill* (1806), 7 Ves. 498; *Vaughan v. Vanderstegen* (1854) 2 Drew. 363).

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### ART. CXCI.—*Legal and Equitable Assets.*

Assets are of two kinds, legal assets and equitable assets:

- (1) Legal assets are assets either by virtue of the common law or by virtue of statute. The former consist of choses in possession, choses in action, and chattel interests in land. The latter consist of estates *pur autre vie*, estates in fee simple not devised for or charged by the owner's will with the payment of his debts, and the statutory separate estate of married women.
- (2) Equitable assets are assets formerly recognised only in the Court of Chancery. They consist of estates *pur autre vie* and in fee simple devised for or charged by the owner's will with the payment of his debts, property over which he by his last will exercised a general power of appointment, and the equitable separate estate of a married woman.

Before 1870 the distinction between legal and equitable assets was of vital importance, since creditors by specialty, whether the heir was bound or not, were entitled to be paid in full out of legal assets before creditors by simple

contract received anything while their debts were payable *pari passu*—that is, equally—out of equitable assets on the principle that equality is equity. But by Hinde Palmer's Act specialty and simple contract debts were made payable *pari passu* out of legal assets also. That Act, it was once thought, did not abolish the distinction itself between specialty and simple contract debts, but a recent decision has shown if the distinction still continues at all it does so only in connection with the executor's right of retainer (see *infra*, Art. CXC.).

In *Cook v. Gregson* (1856), 3 Drew. 547, at p. 550, KINDERSLEY, V.-C., thus defines legal assets: "I think the general principle is that a court of law would treat as assets every item of property come to the hands of the executor which he has recovered or had a right to recover merely *virtute officii*—that is, which he would have had a right to recover if the testator had appointed him executor without saying anything about his property or the application thereof." Since this very learned judge laid down this rule the legislature has given personal representatives the right to claim realty by virtue of their office. But as we shall see, such assets, though legal, are, for the purposes for which the distinction between legal and equitable assets is now of any importance, to be considered rather as equitable assets. We have, therefore, ventured to distinguish legal assets into common law and statutory.

## ART. CXCII.—*Devolution of Assets.*

- (1) All the assets of a deceased person except his legal fee simple estates in copyhold, and his legal estates *pur autre vie* in copyhold where there is a special occupant, now devolve upon the person, if any, appointed by the will (called the *executor*), or, if there is no person so appointed or the person so appointed refuses or is unable to act, upon a person appointed by

the Court of Probate (called the *administrator*) to administer them.

(2) Executors and administrators are both called equally *personal representatives* of the deceased, since by common law the deceased's personality devolved on them. They are now, since the Land Transfer Act, 1897, also the deceased's *real representatives*.

The state of the law as set out in the above Article has only been arrived at by many steps and very recently.

By the common law all the assets which devolved upon an executor or administrator were the deceased's personality. Then by sect. 12 of the Statute of Frauds, 1677, estates *pur autre vie* in freeholds were, in case they had not been devised and where there was no special occupant, to vest in the deceased tenant's executors or administrators, but if there was a special occupant they were to be assets by descent in his hands. This enactment was repealed and re-enacted and extended by the Wills Act. The 3 & 4 Will. 4, c. 104, which made all real estate liable for all the debts of deceased, left its devolution to the heir or devisee untouched. The only way in which a creditor not by specialty in which the heir was bound could make it liable in fact was by an administration action (*In re Illidge*; *Davidson v. Illidge* (1884), 27 Ch. D. 478). It would seem, however, that a creditor by specialty in which the heir was bound could sue the heir or devisee in debt after, just as he could before, that Act (*In re Illidge*; *Davidson v. Illidge, supra*). There seems no reason yet why he should not do so if the executor or administrator transferred the real estate without paying the creditor's debt. Finally, by the Land Transfer Act, 1897, the real estate of a deceased person and real estate appointed by him will now devolve on his executor or administrator. The Act, however, does not extend to legal estates in copyholds (sect. 1), but it does extend to

equitable estates in them (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583).

Realty over which a testator by his will has exercised a general power of appointment now vests in his executor by virtue of sect. 1 (2) of the Land Transfer Act, 1897. It is not clear whether personalty so appointed does so. The executor certainly cannot take *virtute officii*, for such property was not assets at law at all, but could only be made assets for the payment of his debts in equity (*Cook v. Greyson* (1856), 3 Drew. 547). Accordingly it was not liable originally to probate duty (*Drake v. Attorney-General* (1843), 10 Cl. & F. 257). It has very recently, after much difference of opinion, been held by the Court of Appeal to be legal assets and property passing to the executor "as such" within sect. 9 (1) of the Finance Act, 1894 (*In re Hadley*, [1909] 1 Ch. 20).

It is to be noted that once appointed the property over which the power subsisted becomes ordinary assets and subject to the payment of the testator's debts generally. Thus in *Beyfus v. Lawley*, [1903] A. C. 411, A. borrowed funds from B. and covenanted with B. to make a will appointing certain property over which he had a general power in such a way as to make the loan a first charge on the property. He made a will appointing it and declaring B. to be entitled to a first charge:—*Held*, notwithstanding, that the property was distributable among A.'s creditors generally, and that B. was not entitled to any priority.

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#### ART. CXCIII.—*Assets of a Person having a Foreign Domicile.*

Where a person domiciled in a foreign country dies leaving assets in England, then

- (i) So far as the assets are pure personalty, for purposes of representation, of collection and of administration, the law

governing them will be the law of England, while for the purposes of distribution it will be the law of the deceased person's domicile.

(ii) So far as the assets are realty or chattels real they will be governed for all purposes by the law of England.

(i) The general rule is that the law affecting movables is the *lex domicilii*, while the law affecting immovables is the *lex situs*. This rule, however, is subject to the further one that all property of every kind must be recovered according to the law of the place where it is, and the person recovering it must be the person entitled to it by the law of the place where it is. The rule used to be thought to go further, and to make the property recovered subject primarily to the debts and liabilities incurred in the place where it is. It was generally held that all debts contracted in England were payable out of assets situate in England before foreign debts were payable out of such assets (see *Blackwood v. The Queen* (1882), 8 App. Cas. 82). This view, however, was dissented from in *Re Kloebe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175. There it was held that the true rule was that English assets must be administered according to English law, and as a debt contracted out of England is payable equally by English law with a debt contracted in England, both debts were payable *pari passu* out of English assets. If, however, foreign law gave foreign creditors a priority, the English court would see that the English creditors would receive compensation therefor out of the English assets (*ibid.*, p. 177; and see *Re Doetsch, Matheson v. Ludwig*, [1896] 2 Ch. 836). In this connection it is to be remembered that debts for which judgment has been recovered in a foreign court are in England merely debts by simple contract.

(ii) The division is not into realty and personalty but into immovables and movables. Thus leaseholds, though under Lord Kingsdown's Act wills of leaseholds may be

proved as if they were wills of mere personalty, are, just as much as freehold, distributed after the payment of the deceased's owner's debts among the persons entitled by the *lex situs* (*Pepin v. Bruyere*, [1902] 1 Ch. 24), quite regardless of the place of his domicile (*In re Moses*, [1908] 2 Ch. 235). And if in any way the disposition attempted to be made by the will of English leaseholds is contrary to the English law, it is so far void (*In re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584; Stra. Wills, pp. 72, 73).

## CHAPTER II.

## EXECUTORS AND ADMINISTRATORS.

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ART. CXCIV.—*Origin of Executors' and Administrators' Authority.*

(1) An executor's authority arises under the will, but he cannot give legal proof of his authority until he has proved the will, since a probate copy of the will is the only evidence of the will's contents which the court will admit. It follows from this—

- (i) That an executor who does not join in proof of the will does not thereby cease to be an executor. To cease to be an executor he must renounce.
- (ii) That he may validly do without taking out probate any acts of administra-

tion that it is possible to do without proving in a court that he is executor.

- (iii) That he cannot until he has proved the will sue as executor, and
- (iv) That until he has proved the will he cannot be sued as executor unless he has made himself executor *de facto* independently of the will by actually administering, or, as it is called, intermeddling, with the assets.

(2) An administrator's authority arises from and only from the grant of letters of administration by the Court of Probate, and such grant once made relates back to the death of the deceased, and renders valid all acts done in due course of administration by the administrator before the grant. Where, however, a person entitled to letters of administration does acts in due course of administration, but dies without taking letters of administration, such acts become void.

"It is common knowledge that an executor derives his title from the will, and not from the grant of probate, and that he can in his representative character do many things, including the transfer of chattels real, notwithstanding that he has not proved the will" (*per KEKEWICH, J.*, in *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58, at p. 64).

"A creditor of a deceased debtor cannot sue a person named as executor in a will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will," that is, has not merely applied

for, but has been granted, probate by the proper court (*per Lord MACNAGHTEN, Mohamidu Mohideen Hadjiar v. Pitchey*, [1894] A. C. 437, at p. 442).

As evidence that the distinction is not without practical importance, see *Re Pawley and London and Provincial Bank (infra*, at p. 506).

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#### ART. CXCV.—*Offices of Executors and Administrators.*

(1) On the death of a sole executor before he has fully administered the assets of his testator, his executor (who is called an *administrator de bonis non*) is entitled to complete such administration.

(2) On the death of a sole administrator before he has fully administered, his office determines and new letters of administration have to be applied for.

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#### ART. CXCVI.—*Executors may act separately.*

(1) Where there are several co-executors they are not bound to act jointly, and any act done by one of them [in his character of executor] is as valid at law as if it had been done by all subject to the following exceptions and qualifications :

(i) Under sect. 18 of the Companies Clauses Act, 1845, a transfer of stock registered in the names of two or more executors

must be executed by all the registered executors, and under sect. 23 of the National Debt Act, 1870, the Banks of England and Ireland respectively may require transfers of Government stock to be executed by all the executors who have proved the will.

- (ii) Under sect. 2 (2) of the Land Transfer Act, 1897, as amended by sect. 12 of the Conveyancing Act, 1911, a sale of a testator's real estate for the payment of his debts cannot, without the consent of the court, be made, except by all his administrators or all the executors who have proved the will.
- (iii) Where a person has contracted with one only of several executors, if the contract is not carried out the court may refuse such person equitable relief.

(2) The above exceptions to and qualification of the power of one of several executors to act alone apply equally in the case of joint administrators, but it is doubtful whether in any case the act of one only of several administrators is valid.

Formerly it was only a will of personalty which needed proof, just as it was only over personalty that the executor had any control by virtue of his office. If a will disposed of pure realty only, it could not be proved.

This is altered by sect. 2 of the Land Transfer Act, 1897, which gives executors and administrators control over pure realty and provides (sub-sect. (2)) that all

enactments and rules of law relating to the effect of probate and letters of administration as respects chattels real and as respects the dealing with chattels real before probate or administration, shall apply to real estate. It is to be remembered, however, that the Land Transfer Act, 1897, does not apply to legal estates of copyhold tenure, and that consequently they are still subject to the old law.

#### PARAGRAPH (1).

The qualification that one co-trustee cannot act alone unless he purports to act as executor is founded on the decision of the Court of Appeal in *Solomon v. Attenborough*, [1912] 1 Ch. 451. There two persons were co-executors and co-trustees of a will. After the estate had been administered so far as payment of debts and legacies were concerned, one of them without the other's knowledge pawned part of the testator's plate for his own benefit, and without disclosing to the pawnbroker that he held it as executor. JOYCE, J. ([1911] 2 Ch. 159), held that the pawnbroker took a good legal charge as against the other executor. The majority of the Court of Appeal reversed this decision on the ground that to give a good title one co-executor must act in giving it in his character of executor. No authority whatever was cited in support of this view. The court's decision has been affirmed in the House of Lords (*sub nom. George Attenborough and Son v. Solomon*, [1913] A. C. 76), but solely on the ground that the pawnor had in fact acted not as executor but as trustee.

(i) and (ii) The provisions of the Companies Clauses Act, 1845, and the National Debt Act, 1870, apply to executors who have proved, while those of the Land Transfer Act, 1897, applied to all his personal representatives. Accordingly, it was held that where several persons were appointed executors by the will, and only some of them proved, the others who did not prove, but who had not renounced, had to join in selling the realty (*Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58). Where, however, a testator who had assets in England and assets abroad appointed one set of executors for his

English estate and another set for his foreign estate, the former alone were all "his personal representatives" within sect. 2 of the Land Transfer Act, 1897, and could dispose of his English realty without the concurrence of the latter (*Re Cohen's Trustees*, [1902] 1 Ch. 187).

The necessity for all executors joining in transferring a testator's real estate has been abolished by sect. 12 of the Conveyancing Act, 1911, and henceforth only those need join who have proved the will. The amendment applies to probates taken out before as well as after the commencement of the Act (January 1st, 1912), but not to dispositions which took place before its commencement.

(iii) Thus where one executor contracts unknown to the others for the sale of leaseholds, and afterwards, on failure to carry out the contract, the purchaser sues for specific performance, the court may, and, if the purchaser knew the executor was acting against the wishes of his colleagues, will, refuse him relief (see *Re Ingham*, [1893] 1 Ch. 352, at p. 360).

#### PARAGRAPH (2).

It is not customary to appoint joint administrators, and it is not very clear whether when they are appointed they must act jointly or are capable of acting separately like executors. *Jacomb v. Howard* (1751), 2 Ves. sen. 265, would seem to decide that they may act separately. But see *Hudson v. Hudson* (1737), West. t. Hard. 155.

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#### ART. CXCVII.—*Executor de son Tort.*

(1) An executor *de son tort* is one who intermeddles with a deceased person's assets, and who, upon being sued as executor, is unable to prove his title to administer under the deceased's will or letters of administration.

(2) An executor *de son tort* has none of the rights of an executor, but he is subject to all an executor's duties save that he is not liable for assets which he has not received owing to his own wilful default.

As is said in *Carmichael v. Carmichael* (1846), 2 Phil. 101, an executor *de son tort* has all the liabilities of a lawful executor, but none of the advantages. Thus he has no right to retain his own debt (see *infra*, Art. CCX.). He is, however, entitled to receive credit for all acts done in the due administration of the estate.

On the other, he is liable to pay death duties as far as the assets have come into his hands (*New York Breweries Company v. Attorney-General*, [1899] A. C. 62). He is also liable for any waste or conversion to his own use of the deceased's assets (see 30 Car. 2, st. 1, c. 7, sect. 2, made perpetual by 4 & 5 Will. & M. c. 24, sect. 12). He differs from an executor who has taken probate in this respect, that he is not liable for assets lost to the estate through his default (see *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162, at p. 176), and he cannot be compelled to take probate as an executor who has intermeddled with his testator's assets may be (see *Rowsell v. Morris* (1873), L. R. 17 Eq. 20).

A person who intermeddles with a testator's assets as the agent of a lawful executor who has not taken probate, is not an executor *de son tort*, but if he is called to account and is unable to prove the lawful executor's title he is in the same position as if he were an executor *de son tort* (*New York Breweries Company v. Attorney-General, supra*). A lawful executor himself is in the same position except that he can be compelled to take probate.

ART. CXCVIII.—*Who may claim Letters of Administration on Intestacy.*

- (1) In case of intestacy a husband is entitled to claim letters of administration to the estate of his deceased wife. Subject to this, administration is granted to the next of kin, but where the deceased left a widow she will rank with and in general will be preferred to the next of kin of the deceased.
- (2) Where fee simple land forms part of the assets and the heir is not the next of kin, the heir will be equally entitled to administration with the next of kin.
- (3) In case neither next of kin nor heir applies for letters of administration, a creditor may claim the grant of them.
- (4) In any case the Public Trustee may apply for administration (Public Trustee Act, 1906, sect. 6).

PARAGRAPH (1).

A husband is entitled *jure mariti* to take administration to his deceased wife, and by sect. 25 of the Statute of Frauds, 1677, he is under no obligation to make any distribution of her goods among her next of kin. Under sect. 23 of the Married Women's Property [Act, 1882, he is liable as his wife's personal representative to pay her debts out of her separate estate (*Surman v. Wharton*, [1891] 1 Q. B. 491).

The rights of the widow and next of kin now depend on sect. 3 of 21 Hen. 8, c. 5, which is an amendment of 31 Edw. 3, st. 1, c. 11, by which administrators

were first instituted. This statute declared that the administration of the goods of a deceased person should be committed by the ordinary to "the next and most lawful friends of the dead person intestate." Now by sect. 73 of the Court of Probate Act, 1857 (which transferred the jurisdiction of the ecclesiastical courts over grants of probate and administration to the Court of Probate), the court is given a discretion to appoint another person than the person who but for that Act would be entitled to probate.

#### PARAGRAPH (2).

Sect. 2 (4) of the Land Transfer Act, 1897, enacts that where a person dies possessed of real estate the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin.

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#### ART. CXCIX.—*Who may be granted Letters of Administration where there is a Will.*

(1) Where a deceased person leaves a will but through any cause there is no executor, or no executor willing or able to administer the assets, the Court of Probate will appoint an administrator *cum testamento annexo*. Such an administrator has so long as his office continues all the powers and rights of an executor. The court usually appoints as administrator *cum testamento annexo* the residuary legatee under the will.

(2) Where the sole executor appointed is an infant, the court will appoint an adminis-

trator *durante minore aetate* to administer the assets until the infant attains full age. The court usually appoints as administrator *durante minore aetate* the infant executor's guardian.

(3) Where an action respecting the validity of an alleged will of the deceased or for the obtaining, recalling, or revoking any probate or any grant of administration is pending, the Court of Probate may appoint an administrator *pendente lite*. Such an administrator has all the powers of an executor except the right to distribute the assets among the beneficiaries, and he may be allowed such remuneration out of the assets as the court thinks proper.

These limited grants now depend chiefly on 38 Geo. 3, c. 87.

The powers of the administrator with a limited grant were considered in *Whitehead v. Palmer*, [1908] 1 K. B. 151.

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#### ART. CC.—*Powers of Personal Representatives over Assets.*

(1) As regards common law assets the power of personal representatives was absolute. They could give a good title to them by sale, where no sale was necessary, or by gift. In equity, however, as against creditors and beneficiaries, a gift of assets is void, and so is a sale where to the knowledge of the purchaser the sale was

made by the personal representative for the purpose of misapplying the purchase money.

(2) As regards freehold land the powers of personal representatives vary according as the deceased owner died before or after the commencement of the Land Transfer Act, 1897 (January 1, 1898).

- (i) Where the deceased owner died before the Act, the executor had power to sell his land :
  - (a) Where the will contained a direction to him to sell it ; or
  - (b) Where it contained a direction that the land should be sold, and he was directed to distribute the proceeds.
  - (c) Where the land was devised to him for the payment, or charged with the payment, of debts and not merely legacies.
  - (d) Since the Finance Act, 1894, to recoup himself for estate duty upon it where he pays such duty at the request of the persons accountable for the estate duty so paid (sect. 9 (5)).
- (ii) Where the deceased owner died since the Land Transfer Act the personal representatives have the same powers

over real estate as they have over personal estate vesting in them, save that it is not lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate (except where they could have done so before the Act).

(3) A personal representative may pay or allow any debt or claim on any evidence that he thinks sufficient, and he may arrange or compromise any debt or claim in the same way as trustees are entitled to do (see Art. LII., *supra*).

#### PARAGRAPH (1).

The common law rule was that the executor or administrator was absolute master of the deceased's goods subject to a personal liability to account for them or their proceeds. Equity constituted him a trustee of the goods and applied the rules as to trust estates to the assets and his dealings with them (see *Scott v. Tyler* (1788), 2 Dick. 712). But in many respects his position is still different from that of an express trustee. Thus he can plead the Statute of Limitations in an action against him for *devastavit* (*infra*, Art. CCXXII.), or for the recovery of a legacy (*infra*, Art. CCXXII.), and he can favour his own or another's debt (see *infra*, Art. CCXI). For the differences between trustees and executors generally see Stra. Wills, pp. 98—108.

#### PARAGRAPH (2).

(i) Where a purchaser from the executors of a person dying before January 1st, 1898, purchases within twenty years of the death of the testator, he is entitled to assume that the executors are selling in due course of administration and is not put to inquiries whether there are any

debts still owing (*Re Tanqueray-Willaume and Landau* (1881), 20 Ch. D. 465).

(ii) As to the right of sale given by sect. 2 of the Land Transfer Act, 1897, to executors and administrators over freehold land, see *supra*, Art. CXCVI.

#### PARAGRAPH (3).

The right to pay debts and claims due from the estate is given to executors and administrators by sect. 21 (1) of the Trustee Act, 1893. The rest of that section applies equally to personal representatives and trustees.

The wide reading of sect. 21 (1) adopted by the courts is shown in the case of *Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622. There the widow of a testator was joint executrix with another person. The widow claimed that certain investments standing in the testator's name had really been made with her money and on her behalf. The other executor having investigated the matter and come honestly to the conclusion that the widow's claim was just, transferred the investments to her :—*Held*, that he was entitled so to do.

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## CHAPTER III.

## PAYMENT OF LIABILITIES AND DEBTS.

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ART. CCI.—*First Charges on Assets.*

The following constitute first charges upon the assets of a deceased person :

- (i) The expenses incurred in burying the deceased in a manner suitable to his condition in life.
- (ii) Testamentary expenses and all other costs properly incurred by the personal representatives in the due administration of the assets.

Though there can be, by the law of England, no property in a human body living or dead (*R. v. Sharp* (1857), Dear. & Bell. C. C. 160), yet the executor has a right to the custody of his testator's body for the purpose of burial. And he is entitled to bury it in a manner suitable to the testator's condition whatever may be the directions (if any) given by the testator, by will or otherwise, on the subject (see *Williams v. Williams* (1882), 20 Ch. D. 659).

For expenses so incurred and for the costs of administration the personal representatives are personally liable, but just as trustees are (see *supra*, Art. LVIII.), so they are, entitled to an indemnity out of the estate. And the court is solicitous to provide this indemnity. Thus in *Re Griffith, Jones v. Owen*, [1904] 1 Ch. 807, the court in an administration action ordered the costs of all parties to be paid out of the estate. The assets proved insufficient to pay all the costs. Ordered that those of the administration should be a first charge on the assets.

This right is in no way affected by the insolvency of the deceased's estate (see Bankruptcy Act, 1883, sect. 125 (7)).

As to what are now testamentary expenses, see *In re Betts*, [1907] 2 Ch. 149.

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ART. CCII.—*Payment of Debts: Order when Estate is Solvent.*

Whether a person dies testate or intestate and whether his assets are administered by his personal representatives or by the Court of Chancery, if his assets are sufficient to pay his debts and liabilities in full (and his liabilities include his funeral expenses, his testa-

mentary expenses, and the interest which the law allows on his debts), the order in which his debts should be paid is as follows :

- (1) Debts due to the Crown in priority to any debt of the same kind due to a private creditor.
- (2) Debts to which particular statutes give priority.
- (3) Debts due under judgments of Courts of Record recovered against the deceased during his life and duly registered according to the Land Charges Act, 1900.
- (4) Debts due by recognizances duly enrolled.
- (5) Debts based on valuable consideration and due by specialty or by simple contract or under unregistered judgments subject to this, that a debt for which judgment is recovered against the personal representatives ranks before other debts.
- (6) Debts due on voluntary bonds, but not on negotiable instruments not made for value, provided
  - (i) That such a voluntary bond if assigned to an assignee for value without notice that the bond was voluntary ranks as a specialty debt for value.

(ii) That a debt due on a negotiable instrument not made for value, though unrecoverable in the original creditor's hands, if assigned by him to an assignee for value without notice ranks as a simple contract debt for value.

#### PARAGRAPH (1).

This is the rule as laid down in *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179.

#### PARAGRAPH (2).

The most important of the debts to which priority is given by particular statutes are debts due to a friendly society by a deceased officer (sect. 35, Friendly Societies Act, 1896). And by the Regimental Debts Act, 1893, certain debts are given priority in case the debtor, when he died, was subject to military law.

#### PARAGRAPH (3).

Unregistered judgments against the deceased were by the Law of Property Amendment Act, 1860, deprived of all priority and ranked with simple contract debts. That Act has now been repealed by the Land Charges Act, 1900, and priority seems to depend on the registration under that Act.

#### PARAGRAPH (5).

Previous to Hinde Palmer's Act, 1869, debts due by specialty—that is, by bond or covenant under seal—were entitled to be paid in full out of legal assets in priority to simple contract debts, while both were paid *pari passu* out of equitable assets on the principle that equality is equity. By Hinde Palmer's Act it is provided that in the administration of the estate of every person who shall die on

or after January 1st, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt ; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding.

Formerly it was held that this Act did not abolish the distinction between specialty and simple contract debts, but merely made them as between themselves payable *pari passu*. This view of the effect of the Act created many difficulties in administration and was itself very difficult to understand (see *In re Bentinck*, [1897] 1 Ch. 673). Practically it has been altogether swept away by the decision of the Court of Appeal in *In re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584 (see *infra*, p. 534). And now all ordinary debts rank together for all purposes subject to the priorities stated in the Article.

Rent is an ordinary debt payable *pari passu* with other debts (*In re Hastings* (1877), 6 Ch. D. 610).

#### PARAGRAPH (6).

Voluntary bonds were payable at common law after all debts for value but equity where the bond had, before the death of the debtor, been transferred for value without notice, ranked it as a specialty debt (*Payne v. Mortimer* (1859), 4 De G. & J. 447).

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#### ART. CCIII.—*Payment of Debts : Order when Estate is Insolvent.*

When a person dies insolvent the order for the payment of his debts stated in Art. CCII.

is varied according as his assets are administered—

- (a) by his personal representative;
- (b) by the Chancery Division;
- (c) by the Court of Bankruptcy.

There are three enactments dealing with the payment of debts where assets are insufficient.

The first of these is sect. 10 of the Judicature Act, 1875, which enacts that in the administration by the court of the assets of any person who may die after the commencement of the Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules are to prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

Next by sect. 125 of the Bankruptcy Act, 1883, a creditor of a deceased debtor whose debt would have been sufficient to support a petition in bankruptcy had the debtor been living, may present a petition as if the debtor were living, and the Court of Bankruptcy may, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased's estate. Where the Court of Chancery is administering the estate, it may, without a petition being presented, transfer the administration to the Court of Bankruptcy (Bankruptcy Act, 1890, sect. 2).

This power of transfer is discretionary, and the court in exercising it will have regard chiefly to considerations of convenience and expense (*Re Baker* (1890), 44 Ch. D. 262). Generally speaking, however, the court will grant a transfer unless the Chancery proceedings are far advanced

or difficult points of law are likely to arise (*In re Kenward* (1906), 94 L. T. 277).

A power is now given by the Public Trustee Act, 1906, sect. 3 (5), to transfer the administration of estates being administered in any court to the public trustee where either owing to the smallness of the estate or for any other reason such a course is expedient.

In the third place, by the Preferential Payments in Bankruptcy Act, 1888, sect. 1 (6), the law as to preferential payments in the bankruptcy of a living person is to apply in the case of a deceased person who dies insolvent as if he were bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Each of these enactments seems to have been drafted in complete ignorance or in complete disregard of the provisions contained in the earlier statutes. Nevertheless, though the wording is, in each case, different, probably the court will construe them as far as possible as applying under the same circumstances. In that case the three following points should be noticed :

- (1) None of them applies where the deceased left assets sufficient to pay all his debts in full.
- (2) The Judicature Act, 1875, sect. 10, and the Bankruptcy Act, 1883, apply only when the estate is being administered by the court.
- (3) They all apply to the administration only of the *estate* of the deceased. Accordingly none of them introduces into the administration the sections of the Bankruptcy Act, 1883, which go to make property which is no part of a bankrupt's estate assets for the payment of his debts. Thus the rules of bankruptcy as to property within the bankrupt's order and disposition, fraudulent preferences, and voluntary settlements, do not apply to the administration of the assets of a deceased insolvent (*Hasluck v. Clark*, [1899] 1 Q. B. 699).

ART. CCIV.—*Insolvent Estate: Administered by the Personal Representatives.*

(1) When a deceased insolvent's assets are administered by his personal representatives his debts are payable in the order set out in Art. CCII., subject to the following modification only: Debts which under the Preferential Payments in Bankruptcy Acts, 1888 and 1897, are entitled to payment in priority to ordinary debts, must be paid after debts to which particular statutes give priority and before debts due under registered judgments against the deceased.

(2) The debts coming under the Preferential Payments in Bankruptcy Acts, 1888 and 1897, are as follows:

- (i) All parochial or other local rates due from the deceased at his death and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the deceased up to the 5th of April next before his death and not exceeding in the whole one year's assessment.
- (ii) All wages or salary of any clerk or servant in respect of services rendered to the deceased during four months before his death, not exceeding £50.
- (iii) All wages of any labourer or workman not exceeding £25 whether payable for time or for piece-work, in

respect of services rendered to the deceased during two months before his death; provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the court may decide to be due under the contract proportionate to the time of service up to the death.

(iv) Valid claims under the Workmen's Compensation Act, 1906.

(3) These debts are to rank equally between themselves and to be paid in full unless the property of the deceased is insufficient so to pay them, in which case they are to abate in equal proportions between themselves. They must be discharged forthwith so far as there are assets in hand.

These provisions of the Preferential Payments in Bankruptcy Act, 1888, apply only when the "deceased person died insolvent." It would follow then that where the deceased person was solvent at his death, but, through the default of his personal representatives, the assets proved insufficient to pay all his debts and liabilities, the Act would not apply, and the debts set out in the Article would be payable in the order in which they would rank under Art. CCII. This difficulty might, however, be got over by applying for an administration order or an order in bankruptcy.

Claims under the Workmen's Compensation Act, 1906, are made preferential payments in bankruptcy by sect. 5 (3) of that Act.

**ART. CCV.—*Insolvent Estate: Administered by the Chancery Division.***

When a deceased insolvent's assets are administered by the Chancery Division his debts are payable in the order set out in Art. CCII., as altered by the preceding Article, subject to the following further modifications:

- (1) All debts, other than Crown debts, debts to which particular statutes give priority, and debts preferred in bankruptcy, are payable *pari passu*, whether they are judgment, specialty, or simple contract debts or debts due on voluntary bonds which have not been assigned for value, and whether they are present or future or contingent debts or liabilities.
- (2) Debts arising from a loan to a person engaged or about to engage in any business on a contract that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits of the business, or debts in respect of a share of the profits contracted for by the seller of the goodwill of a business in consideration of a share of the profits, and debts due to a wife in respect of any money or other estate lent or entrusted to her husband for the purpose of any trade or business carried on by him, are postponed until the claims of all the

other creditors for valuable consideration have been satisfied.

Section 10 of the Judicature Act, 1875, applies when a deceased person's estate proves "insufficient for the payment in full of his debts and liabilities." In *Re Whitaker, Whitaker v. Palmer*, [1904] 1 Ch. 299, a deceased person's estate was at his death insolvent. Subsequently it realised enough to pay all his debts and liabilities in full, but not sufficient to pay all the interest which in bankruptcy is allowed on all provable debts. The estate was being administered by the court, and FARWELL, J., held that it was insufficient to pay in full the deceased's debts and liabilities, as the interest in question was a liability. His lordship said that the fact that the estate was insolvent at the deceased's death was, in his view of the law, immaterial, and he would have held as he did had it then been solvent. This seems very like reasoning in a circle —the estate should be subject to the rules of bankruptcy because it is insufficient to pay all debts and liabilities, and it is insufficient to pay all debts and liabilities because it is made subject to the rules of bankruptcy.

#### PARAGRAPH (1).

In *Re Oriental Banking Corporation* (1884), 28 Ch. D. 643, it was held that whether or not the priority of Crown debts (which is taken away in bankruptcy) is taken away by sect. 125 of the Bankruptcy Act, 1883, in the case of estates of insolvents administered in Chancery, the prerogative remedies taken away by sect. 150 of the Bankruptcy Act, 1883, are still available when the estate is administered in Chancery. The result is that practically Crown debts are still entitled to priority (and see *Re Churchill* (1888), 39 Ch. D. 174).

Subject to this the rules as to the debts provable and their priority which apply in bankruptcy apply equally when a deceased insolvent's estate is administered under sect. 10 of the Judicature Act, 1875. Thus not merely present but future and contingent debts are to be valued

according to the rules of bankruptcy, and the value can be proved as a debt (*Re Hargreaves* (1890), 44 Ch. D. 236). In the same way, there is no priority for judgment debts (*Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9) and debts due on voluntary bonds are payable *pari passu* with debts for value (*ibid.*). It is hardly necessary to add that the Preferential Payments in Bankruptcy Act, 1897, applies (*Re Heywood*, [1897] 2 Ch. 593).

#### PARAGRAPH (2).

This is a summary of sect. 3 of the Married Women's Property Act, 1882, and sect. 3 of the Partnership Act, 1890. That these apply to insolvent estates administered in Chancery has been decided in *Re Leng*, [1895] 1 Ch. 652.

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#### ART. CCVI.—*Insolvent Estate: Administered by the Court of Bankruptcy.*

When a deceased insolvent's assets are administered by the Court of Bankruptcy his debts are payable in the order set out in Art. CCII., as altered by the two preceding Articles, subject to the following modification: Debts due to the Crown are payable *pari passu* with other debts due under judgments, specialties, simple contracts, and voluntary bonds.

This seems to be the purport of the language used by the Lords Justices in *Hasluck v. Clark*, [1899] 1 Q. B. 699, at pp. 704, 710. There a creditor of an insolvent estate obtained judgment against the personal representatives and seized goods in execution. Subsequently an order was made to wind up the estate in bankruptcy:—*Held*, that the execution could not be set aside as it would be in the case of bankruptcy proceedings against a living person. The chief ground of this decision seemed to be

that if the estate had been administered in Chancery it could not have been set aside, and that it was most undesirable that the question should depend upon which court the administration was being conducted in.

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#### ART. CCVII.—*Secured Creditors.*

Where a deceased person's estate is insolvent and the assets are being administered by the Court of Chancery or Bankruptcy, a creditor holding a charge, lien, or mortgage on the assets or any part of them for a debt due to him may

- (i) Rely on his security and not prove for the debt : or
- (ii) Realise his security and prove for the balance remaining unsatisfied : or
- (iii) Surrender his security and prove for the whole debt : or
- (iv) Set a value on his security, and prove for the balance.

This depends upon rules 8 to 17 of the Second Schedule to the Bankruptcy Act, 1883.

Before that Act a secured creditor was entitled to prove for his whole debt, and then if his security when realised brought his dividend to more than twenty shillings in the pound, he was obliged to return to the executor or receiver in bankruptcy the surplus.

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ART CCVIII.—*Arrears of Rent.*

(1) Until an order is made for the administration of a deceased person's assets in bankruptcy a landlord is entitled to distrain for arrears of rent due to him by the deceased. Where the tenancy of the deceased comes within the Agricultural Holdings (England) Act, 1908, he can distrain for one year's, and in other cases for six years' arrears. But if the deceased died insolvent, and the distress was levied within three months of the deceased's death, the debts preferred in bankruptcy will be a first charge on the goods taken in restraint.

(2) After an order for administration in bankruptcy is made a landlord can distrain only for six months' arrears of rent accrued due before the order, subject to the same priority for preferred debts.

## PARAGRAPH (1).

This seems to be the effect of sect. 28 of the Agricultural Holdings (England) Act, 1908, and sect. 42 of 3 & 4 Will. 4, c. 27. Administration in Chancery does not limit the landlord's right of distress (*Re Fryman's Estate* (1888), 38 Ch. D. 468). As to preferential debts in bankruptcy forming a first charge on the distress when the deceased was insolvent, see *Re Heywood*, [1897] 2 Ch. 593.

## PARAGRAPH (2).

This seems to be the effect of sect. 42 of the Bankruptcy Act, 1883, as amended by s. 28 of the Bankruptcy Act, 1890.

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ART. CCIX.—*Statute-barred Debts.*

(1) Personal representatives are entitled to pay any debt of the deceased which but for the Statutes of Limitations would be recoverable against his estate, provided such debt has not been adjudicated upon and held statute-barred.

(2) This right is not lost upon an order for administration being made, but after such order or upon any application being made to the court in respect of such debt, then if any one interested in the estate objects to the payment of the statute-barred debt, the court will restrain the personal representatives from paying it.

## PARAGRAPH (1).

The debt must be one which would be recoverable but for the Statutes of Limitations. If for some other reason it would not be recoverable the right to pay it is gone. Thus in *Re Rownson* (1885), 29 Ch. D. 358, the father of a lady about to marry promised verbally to settle a certain amount upon her. By sect. 4 of the Statute of Frauds, 1677, this promise, being one made in consideration of marriage, could not be enforced unless it was reduced into writing and signed by the father. The father died more than six years after the promise:—*Held*, that his personal representatives had no right to pay over the sum promised to be settled. And see *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66 (*infra*, p. 532).

And the statute-barred debt to be payable by the personal representatives must not have been adjudicated irrecoverable. Thus in *Midgley v. Midgley*, [1893] 3 Ch. 252, a creditor whose debt was statute-barred sued the

executors. The court held it was irrecoverable. Afterwards one of the executors wished to pay it :—*Held*, that he had no right so to do.

#### PARAGRAPH (2).

When an order for administration is made the court will permit statute-barred debts to be paid only when no one interested in the assets objects. And this rule applies when any application is made to the court which could formerly have been made only in an administration action. Thus in *Re Wenham, Hunt v. Wenham*, [1892] 3 Ch. 59, a summons under Order 55, rule 3 (*a*), was taken out by personal representatives to determine what was owing to a certain creditor. This creditor's debt was in fact statute-barred. The residuary legatee appeared on the summons and objected to the personal representatives paying the debt :—*Held*, that the objection was good.

It may, perhaps, be added that the executors' affidavit for probate including among the testator's debts one due to the plaintiff is not such an acknowledgment as will prevent the statute running against the plaintiff (*In re Bearan*, [1912] 1 Ch. 196). And further, that where the will charges the testator's debts on land the period of limitation of a simple contract debt is as against the land, not six but twelve years (*In re Balls, Trewby v. Balls*, [1909] 1 Ch. 791).

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#### ART. CCX.—*Retainer of Debts.*

(1) A personal representative is entitled to pay to himself out of the common law assets a debt, whether recoverable or statute-barred, due to him, in priority to paying a debt of the same degree due to another creditor. This right exists whether the debt is due to him personally [or to a trustee for him] or to him as

trustee for another person, and it is possessed by an administrator *durante minore ætate* in respect of debts due to himself or to the executor for whom he is administrator *durante minore ætate*. But this right to retain is an absolute right and not a duty, and so where the debt is due to him as trustee he cannot be compelled by his cestui que trust to exercise it.

(2) This right is not lost by an order for administration or by payment of the assets into court or by the appointment of a receiver, in so far as the common law assets actually came into the possession of the personal representatives.

(3) In the case of testators dying before January 1, 1898, a devisee to whom the testator owed a debt by specialty in which the heir was bound could pay his debt out of the land devised to him in priority to that of any other specialty or other creditor.

This right to prefer himself given to a personal representative is not regarded with favour by the court, which never permits it where it can prevent it. Thus where a creditor as creditor obtains a grant of letters of administration the court insists that he shall enter into an undertaking not to prefer his own debt (see W. N. (1899), p. 262; *In re Belham*, [1901] 2 Ch. 52). In the same way it has been held that the sole justification of the rule is that it prevents a creditor of equal degree with the personal representative or devisee getting priority for his debt by obtaining judgment against the personal representative or devisee. Accordingly where there is no possibility of his obtaining such priority it is held that there is no right of retainer. On this ground it was decided that a devisee had no right to retain against specialty debts where the heir was not bound, or simple contract debts, because the only remedy such creditors had under 3 & 4 Will. 4, c. 104, was by administration

action under which all creditors of the same degree were paid *pari passu* (*In re Illidge*, *Davidson v. Illidge* (1884), 27 Ch. D. 478).

And on the same ground it has been held that an executor or administrator has now no right to retain out of land vested in him as assets under the Land Transfer Act, 1897 (*In re Williams*, *Holder v. Williams*, [1904] 1 Ch. 52).

Again, where the executor is a trustee of the debt due by his testator, the cestui que trust cannot compel him to retain. Thus in *Re Ridley*, *Ridley v. Ridley*, [1904] 2 Ch. 774, A., a sole executor, died insolvent. He was indebted to his testator's, C.'s estate. He appointed B. his executor. The beneficiaries under C.'s will applied to the court to compel B. to exercise his right to retain out of A.'s estate the debt due to him as administrator *de bonis non* of C.:—*Held*, that they had no right to such an order (and see *In re Bennett*, [1906] 1 Ch. 216).

The personal representative may retain not merely a debt due to him as trustee (*Sander v. Heathfield* (1874), L. R. 19 Eq. 21); but also, it would seem, a debt due to a trustee for him (*Loomes v. Stotherd* (1823), 1 S. & S. 458 *sed quare*; and see *Re Hayward*, [1901] 1 Ch. 221). He may retain also not merely in respect of a debt due at the death of the testator, but also of a debt accrued due since (*Boyd v. Brookes* (1864), 34 Beav. 7), but not in respect of a contingent liability (*In re Beeman*, [1896] 1 Ch. 48), or unliquidated damages (*In re Compton* (1885), 30 Ch. D. 15). He can also retain against statute-barred debts, provided such debts would be recoverable but for the Statutes of Limitations. Thus in *In re Wheeler*, *Hankinson v. Hayter*, [1904] 2 Ch. 66, a person who afterwards became the executor of a married woman made a loan to her before 1882. The loan was therefore at the time it was made not recoverable, since, before the Married Women's Property Act, 1882, a married woman could not render herself liable on contract. She, however, subsequently to 1882 gave an acknowledgment of the debt:—*Held*, that the executor after her death was

not entitled to retain, since the debt was not a legal debt when the loan was made, and the subsequent acknowledgment could not make it one. And a widow who is executrix of her husband's will, may retain against a debt due to her even if the estate is insolvent (*In re Ambler*, [1905] 1 Ch. 697).

The right arises out of the possession of the assets by the personal representative. Once the personal representative has obtained possession, his right to retain is not lost by his paying them into court (*Pulman v. Meadows*, [1901] 1 Ch. 233), or by an order for administration (*In re Belham*, [1901] 2 Ch. 52). It is defeated by an order in bankruptcy in so far as the assets are received by the receiver, but not in respect of assets actually received by the personal representative (*In re Wells* (1890), 45 Ch. D. 569). He need not declare his intention to retain until a claim is made by another creditor against the assets (*Re Rhoades*, [1899] 2 Q. B. 347). If he does not then plead it or *plene administravit*, he cannot, after the creditor has obtained judgment, set his right up (*In re Marvin*, [1905] 2 Ch. 490). If the debt due to him is larger than the value of the assets, he may retain the assets *in specie* (*In re Gilbert*, [1898] 1 Q. B. 282).

The decision of *In re Samson*, [1906] 2 Ch. 584 (*infra*, p. 534), makes it doubtful whether a personal representative cannot retain a simple contract debt due to himself in priority to a specialty debt due to another ; but the point was expressly left open in that decision.

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#### ART. CCXI.—*Right to Prefer Debts.*

- (1) Personal representatives are entitled to pay the debt, whether recoverable or statute-barred, due to one creditor of the deceased in preference or priority to a debt of the same degree due to another creditor.

(2) This right is lost upon an order for administration being made or upon a creditor obtaining judgment against the personal representatives for his debt.

"The right of an executor to prefer one creditor and the right to retain his own debt are in many respects the same thing in substance and in principle, though no doubt the latter can, while the former cannot, be exercised after an administration order" (*per North, J., In re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541).

Formerly it was held (*In re Hankey, supra*) that the distinction between specialty and simple contract debts was not abolished by Hinde Palmer's Act, 1869, so far as the right to prefer was concerned. That view has now been dissented from by the Court of Appeal in *In re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584. There an executor, knowing that his testator owed a specialty debt to one creditor, paid a simple contract debt due to another creditor without reserving funds to pay the specialty debt. The testator's estate in the result proved insufficient, and the specialty debt was not paid:—*Held*, that the executor was not liable in devastavit to the specialty creditor.

Before the Judicature Act, 1873, the personal representative could prefer only before an administration action was commenced. Now he can prefer until judgment for administration is given (*Vibart v. Coles* (1890), 24 Q.B.D. 364).

An executor may pay a non-interest-bearing debt before an interest-bearing debt of the same degree (*Robinson v. Cumming* (1742), 2 Atk. 409).

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ART. CCXII.—*Right to retain Legacy against Legatee's Debt.*

Where a legacy of pure personalty is bequeathed to a person who is indebted to the testator's estate or who is under a liability to the testator's estate which may ripen into a debt, the executor may retain for the benefit of the estate so much of the legacy as may be necessary to discharge the debt or secure the liability.

This right to retain against a legatee's debt or liability applies only to legacies of pure personalty. Legacies of leaseholds and devises of freeholds are not within it (*Ex parte Burff* (1849), De G. 613). It applies, like the personal representative's right of retainer, to statute-barred debts (*Courtney v. Williams* (1844), 3 Hare, 539), and as against the legatee's assignee (*Re Knapman* (1881), 18 Ch. D. 300), and his trustee in bankruptcy (*Re Watson*, [1896] 1 Ch. 925), unless in the latter case the executor proves in the bankruptcy for the whole debt (*Re Binns*, [1896] 2 Ch. 584).

But it does not apply where the legatee was never under any legal obligation to the testator, although he had funds in his possession which, apart from the Statute of Limitations, the executor would have been entitled to follow (*In re Bruce*, [1908] 2 Ch. 682); nor where the debt owed by the legatee is owed by him as a member of a partnership (*Turner v. Turner*, [1911] 1 Ch. 716); nor can it be relied on where the debt is a debt payable only by instalments (*In re Abrahams*, [1908] 2 Ch. 69); nor where the executor has accepted a dividend on it on the legatee's bankruptcy (*In re Sewell, White v. Sewell*, [1909] 1 Ch. 806).

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**ART. CCXIII.—*Creditors' Right to follow Assets.***

A creditor whose debt has not been paid when the assets of a deceased person are distributed among the beneficiaries or are given away by the personal representative, is entitled to follow such assets into the beneficiaries' or donees' hands, even where, in the former case, the personal representative has made the distribution by the order of the court. But this right may be lost by acquiescence or delay on the part of the creditor or by the sale of the asset by the beneficiary or donee to a bona fide purchaser for value without notice that the deceased's debts were not completely discharged.

Like the right of a cestui que trust to follow trust funds, the right of a creditor to follow assets continues until the assets have been sold to a purchaser for value without notice. This is the case no matter whether the assets were paid away to the legatees or were given away by the personal representative, and no matter whether the executor paid the assets away of his own motion or by direction of the court (*David v. Frowd* (1833), 1 My. & K. 200). But as the right to follow assets is one given not by the common law but only by equity (*Russell v. Plaice* (1854), 18 Beav. 21) an equitable defence is allowed. Therefore delay or acquiescence on the creditor's part may bar his right (*Blake v. Gale* (1886), 32 Ch. D. 571, and see *Re Brogden* (1888), 38 Ch. D. 546), as does a sale of the assets to a purchaser for value without notice. And see *In re Eustace*, [1912] 1 Ch. 561, cited p. 384, *supra*.

ART. CCXIV.—*Creditors' Right to Donationes Mortis Causâ.*

In case the assets prove insufficient for the payment of the deceased's debts and liabilities in full the creditors are entitled to resort to property which the deceased during his life gave away as *donationes mortis causâ*.

By *donatio mortis causâ* is meant a gift of pure personality made by the deceased, either personally or by an agent acting in his presence and completed by delivery to the donee. The gift may be of the property itself or of the means of obtaining possession of the property or of the documents of title to the property. It must have been made when the donor was in expectation of dissolution, and be conditioned to be void in case of his recovery, and to be absolute in case of his death as he expected when he made the gift.

It has been already pointed out that though a deceased person's *donationes mortis causâ* are liable on deficiency of assets for the payment of his debts, yet they form no part of his assets. This is because they operate not from his death but from their delivery during his life to the donee (*Solicitor to the Treasury v. Lewis*, [1900] 2 Ch. 812).

A good example of a *donatio mortis causâ* is that in *Re Dillon* (1890), 44 Ch. D. 76. There a person momentarily expecting death gave his sister-in-law a banker's deposit note, saying, "I am going to give it you conditionally. If I get well you will give it me back ; if not you are all right." Here the deceased expressed precisely the condition attached to a *donatio mortis causâ*; but it is not necessary that this condition should be actually expressed if, from the surrounding circumstances, it is clear that the

gift was intended to be absolute only on the donor's death.

The gift must be evidenced by delivery either of the thing given or of the means of obtaining it—such as the keys of a box in which it is contained (*Mustapha v. Wedlake*, W. N. (1891) 201)—or of the documents of title to it—such as securities for a mortgage debt, bills of exchange payable to order even though not indorsed, cheques, post-office orders, etc. (*Beddington v. Bauman*, [1903] A. C. 13, at p. 19). And the gift may be made subject to a condition that the donee shall do something, such as pay for the donor's funeral (*Hills v. Hills* (1841), 8 M. & W. 401 ; and see Stra. Property, p. 268).

## CHAPTER IV.

## DISTRIBUTION OF ASSETS.

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**ART. CCXV.—*Notice to Creditors to send in Claims.***

Where personal representatives give such notice to creditors and others to send in their claims against the assets as, in the opinion of the court in which such personal representatives are charged, would have been given by the Chancery Division in an administration suit, the personal representatives, after the expiration of the time fixed in such notice for sending in claims, may distribute the assets among those entitled to them, without incurring any personal liability for claims of which they had no notice at the time of distribution.

This power is conferred upon personal representatives by sect. 29 of the Law of Property Amendment Act, 1859. The notice should be sent out as soon as possible after the deceased's death (*per ROMER, L.J., Re Kay, Mosley v. Kay*, [1897] 2 Ch. 518, at p. 522). What is

sufficient notice within the section depends on the facts of each case. Thus in *Re Bracken, Doughty v. Townson* (1889), 43 Ch. D. 1, in the case of a testator who had farmed fifty-two acres of land and followed no other occupation, the executors published a notice requiring creditors to send in their claims within a month. This was inserted in the London Gazette and in three local newspapers :—*Held*, that the advertisement and length of notice were sufficient.

This enactment does not in any way prejudice the right of creditors and claimants to follow the assets if necessary into the hands of the beneficiaries. It merely protects the personal representative.

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#### ART. CCXVI.—*Future and Contingent Liabilities.*

Personal representatives will not be liable personally for future or contingent liabilities of their testator or intestate provided that before distributing the assets among the beneficiaries—

- (1) Where being liable as such to rents, covenants, or agreements contained in a lease or an agreement for a lease granted or assigned to their testator or intestate, they set apart a sufficient amount of assets to satisfy any covenant to expend a definite sum of money on the property demised and then assign the lease or agreement to a purchaser ;
- (2) Where being liable as such to any other future or contingent liability, they set apart an amount of assets reasonably

sufficient to meet it or obtain an order of administration under which they are directed to distribute the assets among the beneficiaries without setting apart such amount of assets.

#### PARAGRAPH (1).

This power is conferred upon personal representatives by sects. 27 and 28 of the Law of Property Amendment Act, 1859. It can be exercised only when there is privity between the personal representatives and the lessor. Thus where a testator had held leaseholds subject to onerous covenants but had assigned them before his death, the executors were not entitled to set apart assets against any liability which might arise (*In re Nixon, Gray v. Bell*, [1904] 1 Ch. 638). The word "purchaser" under these sections means a person who buys the leasehold and pays a price for it; and accordingly where a transferee receives payment for taking it and the burden of the covenants over, there is no sale of the leasehold within them (*In re Lawley, Jackson v. Leighton*, [1911] 2 Ch. 530, *per* SWINFEN EADY, J., at p. 533).

This enactment does not in any way prejudice the right of landlords in case of breach of covenant to follow the assets if necessary into the hands of the beneficiaries.

Where the estate is being administered in bankruptcy, sects. 55 and 125 of the Bankruptcy Act, 1883, apply, and the trustee is entitled to disclaim property subject to onerous covenants (*In re Mellison*, [1906] 1 K. B. 68).

#### PARAGRAPH (2).

It is not the custom of the court to retain funds for the purpose of meeting contingent liabilities, but personal representatives must do so to escape liability for devas-tavit in case such liabilities become actual in the future. An order of administration, however, will protect them

(*In re King*, [1907] 1 Ch. 72). If, however, the contingent liability does not become absolute within six years after the personal representatives have distributed the assets it will be barred as against them personally (*Lacoms v. Warmoll*, [1907] 2 K. B. 350, but see *In re Blow*, [1913] 1 Ch. 358).

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### ART. CCXVII.—*Kinds of Legacies.*

(1) A *legacy* is a gift by will of personal estate; a *devise* is a gift by will of real estate.

(2) Legacies are either *specific* or *general*. They are specific when the estate given is specifically identified; they are general when the estate given is not specifically identified. When a general legacy is of money payable out of the general estate it is called a *pecuniary* legacy. When it is of money payable out of specifically identified estate it is called a *demonstrative* legacy; when it is of the remainder of the personal estate after payment of the testator's debts and satisfaction of the other legacies, it is called a *residuary* legacy.

(3) A specific legacy is *adeemed* (or defeated) so far as the testator disposed of the specific estate included in it during his life; a general legacy is not liable to ademption in this way.

(4) All devises are specific.

#### PARAGRAPH (2).

As ordinary examples of the different kinds of legacies the following may be given: "My gold watch to A.," a

specific legacy ; " £1,000 to B.," a general pecuniary legacy ; " £1,000 out of the proceeds of the sale of my Midland Stock to C.," a general demonstrative legacy ; " all the rest of my personal estate to D.," a general residuary legacy. But a sum of money may be a specific legacy if it is specifically identified. Thus, " I leave to X. the £1,000 owed by X. to me," is a specific legacy (*In re Wedmore*, [1907] 2 Ch. 277). And a specific part of a residuary bequest may also be so (*In re Maddock*, [1902] 2 Ch. 220), and so may a gift generally described, as " all my stock in the Midland Railway," even though that will include not merely the stock the testator had at the time he made his will, but any subsequently bought by him (*In re Slater*, [1907] 1 Ch. 665). On the other hand, what is in effect a legacy of specific property may be a general legacy. Thus, a gift of " £1,000 in Midland Railway Stock " is a general legacy even though at the time the testator made his will he had just £1,000 Midland Railway Stock (*Sibley v. Perry* (1802), 7 Ves. 523). If the gift had been of " *my* £1,000 Midland Railway Stock " the gift would have been specific.

### PARAGRAPH (3).

This division of legacies is made for two purposes. The first is in connection with their liability to be defeated. If a testator before his death disposes of an article which he has specifically bequeathed, that bequest is adeemed or cut out of his will, there being nothing among his assets at his death on which it can operate (*In re Slater*, [1907] 1 Ch. 665). But general or demonstrative legacies are not liable to be defeated in this way. A general legacy is not adeemable since it is the bequest of nothing except a payment out of the assets, and so is payable as long as there are assets to pay it. A demonstrative legacy is not adeemed by the disposal of the property out of which it is to be paid during the testator's life : after such disposal it ranks simply as a general legacy (see Strahan's Wills, pp. 25—27).

The second purpose for which this division of legacies is made is in connection with what is called abatement,

that is, the reduction or defeat of legacies when there are not sufficient assets to pay both them and the testator's debts and liabilities in full. This is dealt with in the next Article.

#### PARAGRAPH (4).

There is no division of devises into specific and general devises. A gift by will of real estate, no matter in what terms it is described, is always specific. Thus a residuary devise—"all the rest of my freeholds I devise to B."—is treated as a specific devise of all the freeholds not otherwise disposed of (*Lancefield v. Iggylden* (1874), L. R. 10 Ch. 136).

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### ART. CCXVIII.—*Order of Distribution.*

(1) When a person dies leaving a will, so soon as his executor has paid all the debts and discharged or provided for all the liabilities, his duty is to transfer the personalty and realty remaining to the persons by law entitled to it respectively. In order to ascertain who these persons are he is bound to "marshall" the deceased's assets, that is, to hold that as between the beneficiaries the debts and liabilities have been paid out of the assets in the following order :

- (i) The general personal estate not bequeathed at all or bequeathed by way of residue only.
- (ii) Real estate devised for the payment of debts.
- (iii) Real estate descended.

- (iv) Real estate devised either specifically or by way of residue and charged with the payment of debts.
- (v) General pecuniary legacies including annuities.
- (vi) Specific legacies, and real estate devised either specifically or by way of residue and not charged with the payment of debts.
- (vii) Property specifically appointed by the will under a general power of appointment.

(2) When a person dies intestate and letters of administration are granted, it is the duty of his administrator to pay his liabilities, applying all the personal estate for that purpose before applying any of the real estate, and he can apply the real estate to the payment of the intestate's debts only subject to the intestate's widow's right to dower out of it. So soon as the debts are paid, he should pay the widow (if any) if the intestate has died childless, £500, raised rateably out of the personal and real estate and then distribute the personality among the widow (if any) and the next of kin of the deceased according to the Statutes of Distributions, and convey the real estate subject to the widow's right to dower to the heir.

(3) Where a testator dies partially intestate and without next of kin, then in the absence of any indication to the contrary, his executors are as against the Crown entitled to his undisposed of personality.

It is to be noted that the order of liability stated in this Article obtains only as between the beneficiaries themselves. A creditor who obtains judgment against an executor or administrator is entitled to resort to any part of the estate to satisfy the judgment debt. If he seizes, for example, property specifically bequeathed, then the legatee to whom it is bequeathed is entitled to be compensated at the expense of all those entitled to any of the property ranking after, and therefore liable before, specific legacies. And also it applies only in so far as the testator does not indicate an intention to the contrary. Thus a direction in the will that certain legacies shall be first paid in full gives such legacies priority over all others (*Re Hardy* (1881), 17 Ch. D. 798).

There is this qualification. A widow's right to dower out of her husband's real estate if not defeated under the Dower Act, 1834, still takes precedence of the claims of both creditors and beneficiaries (*Northern Bank v. McMackin*, [1909] 1 I. R. 374). This, however, can now only arise when the husband dies intestate in respect of the land in question.

#### PARAGRAPH (1).

(i) The residuary personality—together with personality not disposed of at all by the will—is primarily liable for the payment of the testator's debts as between the beneficiaries under his will. And in order to relieve it of this primary liability it is not sufficient that other property is charged with or given in trust for the payment of debts ; the residuary personality must be specifically exonerated from them (*Powell v. Riley* (1871), L. R. 12 Eq. 175 ; *Re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547). But what is in form a general residuary bequest may by qualifying words be changed as to all or part into a specific bequest. Thus in *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220, a testatrix devised and bequeathed all the residue of her property to A. and B., her executors, to pay her debts and then for the benefit of A. By a secret agreement made with A., A. was to hold such part of the residue as consisted of savings out

of income made by the testatrix during her life in trust for C.:—*Held*, that this agreement must be read into the will, and that the legacy to C. was a specific legacy.

This rule was carried so far formerly that it was held that where the testator had mortgaged freeholds or chattels real or where he had contracted to purchase them and had not paid the purchase-money, then the heir, devisee, or legatee who took such freeholds or chattels real was entitled to have the mortgage debt or the purchase-money paid out of the general residuary personality unless the mortgage debt was “ancestral,” that is, the deceased was not the person who contracted it, but had himself succeeded to the property subject to the debt. The law as to that has now been altered by Locke King’s Act, 1854, as amended by the Acts of 1867 and 1877 (now called Land Charges Acts, 1854 to 1877). These Acts make the freeholds and chattels real devolve *cum onere*, unless a contrary intention appears from the will. A mere direction to pay the testator’s debts is not a sufficient indication of such a contrary intention. The indication must be specific. But it need not be express. Thus a direction that the devisees of some mortgaged properties shall take them subject to the mortgage debts will be a sufficient indication that the devisees of other mortgaged properties as to which there is no such direction are intended to take them free from debt (*In re Valpy*, [1906] 1 Ch. 531). And again an express direction need not be a general exoneration. Thus a direction that the mortgage debt in one property shall be paid out of a certain fund is an exoneration of the mortgaged property only so far as the fund is sufficient to pay the mortgage debt (*In re Birch, Hunt v. Thorn*, [1909] 1 Ch. 787).

In order, however, that these Acts may apply there must be a charge or lien on the freehold or chattel real. For example, if A. sells land to B. and agrees to convey on receiving half the purchase-money and to accept B.’s personal security for the remainder, then there is no lien for the unpaid purchase-money on the land, and on B.’s death his debt to A. will be payable primarily out of his

general personality (see *Re Cockcroft* (1883), 24 Ch. D. 94). A rent issuing out of a leasehold estate is a chattel real within this Act (*Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 111).

These Acts do not interfere with a mortgagee's right to sue the executors on the deceased's covenant. When he does so the legatees have a lien on the land so far as the personality has been taken away by payment of the mortgage debt (*Webb v. Smith* (1885), 30 Ch. D. 192). And the Acts have application only to successions to mortgaged property *mortis causâ*. Where the mortgaged property was conveyed by the deceased *inter vivos*, even though the conveyance was voluntary, then, unless it was expressly conveyed subject to the mortgage debt, the grantee is entitled on the death of the grantor to have the mortgage debt paid out of his personal estate (*In re Darby*, [1907] 2 Ch. 465; and see *In re Wilson*, [1908] 1 Ch. 839).

(ii), (iii), (iv), and (v) The order in which these different properties become liable for debts is well shown in *Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834. There a testator after appointing two executors directed that his debts should be paid as soon as possible. Then he made a specific bequest of certain farm stock, and "the following pecuniary legacies," to X. £500 and to Y. £200. The residue of his personal estate he bequeathed to his executors. He then devised one farm to A. and another to B. He owned at his death a third farm which was not disposed of by his will. His residuary personality and the proceeds of the undevised farm, which the executors sold, being insufficient for the payment of the testator's debts and liabilities, the rest of the personal estate was applied for this purpose. Then X. and Y. claimed that A. and B. should make up to them their legacies on the ground that, as they had taken the farms subject to the direction to pay the testator's debts, the devisees were under a prior liability for such payment:—*Held*, that the claim of X. and Y. was good.

Two further points with regard to general or pecuniary legacies are to be noted. In the first place they are

payable out of the personal estate only unless they are expressly charged upon the land (*Robertson v. Broadbent* (1883), 8 App. Cas. 812, at p. 815). And when they are expressly charged upon land and payable exclusively out of such land, they become specific legacies, and are adeemed by the testator disposing of such land during his life (*Newbold v. Roadknight* (1830), 1 R. & My. 677).

#### PARAGRAPH (2).

On intestacy the personal estate of the deceased is primarily liable for his debts, subject to the provisions of the Land Charges Acts, 1854 to 1877, which apply to cases of intestacy as well as where the deceased left a will.

The £500 payable to the widow of a childless intestate is a charge on the deceased's realty and personality created by the Intestates' Estates Act, 1890. It is a first charge and is payable rateably out of his net realty and personality (*In re Heath*, [1907] 2 Ch. 270), and is in addition to her right to a half share of the personality and to dower out of the realty. The Act does not apply where there is only a partial intestacy, but it does apply where the deceased made a will, if such will had no effect owing to all the beneficiaries predeceasing the testator (*In re Cuffe*, [1908] 2 Ch. 500).

#### PARAGRAPH (3).

Formerly the executors were entitled to the undisposed of personality even as against the testator's next of kin, but this was altered by the Executors Act, 1830. That Act did not affect their claim as against the Crown when the testator left no next of kin unless the testator indicated in his will that he did not intend the executors to benefit. Such an indication is inferred from his leaving them as executors equal legacies but not from his leaving them unequal legacies (*Attorney-General v. Jeffreys*, [1908] A.C. 411).

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ART. CCXIX.—*Rights of Legatees to follow Assets.*

(1) Where the assets are insufficient, after the payment of the debts, to pay the legacies in full, then a legatee whose legacy was liable to abate but has been paid in full must return to the other legatees the amount by which it should abate.

(2) Where a pecuniary legacy is postponed and the executors set apart and invest a portion of the assets to meet it and distribute the rest, then, if when the time for payment arrives the investments are not in value equal to the amount of the legacy, the legatee is entitled to recover the difference from the residuary legatee.

(3) Any legatee whose legacy has not been paid in full is entitled to follow the assets into the hands of a voluntary assignee of the personal representatives or a purchaser for value who knew that the assignment to him was intended to be in fraud of the legatees.

PARAGRAPH (1).

This right to follow assets paid away to co-legatees arises only where the assets are insufficient to pay all the legatees in full. When the assets were sufficient to do so at the time the co-legatees were paid, and the subsequent deficiency arose through the default of the executor, no such right exists (*Fenwick v. Clarke* (1862), 4 De G. F. & J. 240; *Re Wilson* (1890), 45 Ch. D. 249).

## PARAGRAPH (2).

A legacy was given to a person contingently on his attaining a certain age. No interest was given in the meantime. The executor set aside what he thought would be sufficient to pay the legacy at the time of payment. He invested this sum. The securities depreciated, and when the legatee reached the age in question the securities were not sufficient to realise the amount of the legacy :—*Held*, that the legatee was entitled to have that amount made up by the residuary legatee, and that the executor, having acted reasonably, was not personally liable (*Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226).

## PARAGRAPH (3).

See *supra*, Art. LXIV. .

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**ART. CCXX.—*Payment of Interest or Income upon Legacies.***

(1) An immediate devise or an immediate specific legacy carries with it all income accruing upon the property devised or bequeathed from the death of the testator, and it must bear all the expenses reasonably incurred by the executors in preserving it till their assent to it can be given.

An immediate general or demonstrative legacy carries no income or interest till the end of a year after the testator's death. If it is then still unpaid, the legatee is entitled to interest at the rate of 4 per cent. upon it from that time until payment, even though being a demonstrative legacy it is made payable out of a reversionary fund.

(2) A contingent devise or legacy (except a contingent residuary legacy) carries neither income nor interest until the time arrives to which it is postponed.

(3) The above rules are subject to the further rule that a general legacy carries interest from the death of the testator :

- (i) Where the legacy (whether vested or contingent) is expressly given for the maintenance of an infant.
- (ii) Where it is given by a father or person *in loco parentis* to the legatee and the legatee is an infant, then, in the absence of any other provision for the maintenance of the infant, interest on the legacy will be given for maintenance, whether the legacy is vested or contingent on the infant attaining twenty-one.
- (iii) Where it is given expressly or by construction of law in satisfaction of a debt due by the testator to the legatee.

The year following the death is called the "executor's year." It is the period allowed to him to administer the assets, during which the legatees have no right *prima facie* to claim payment of their legacies. If, however, the executor has in fact got in and realised all the assets and paid all the debts, it is his duty to pay the legacies whether the year has expired or not.

But this is subject, of course, to the provisions of the will. Thus if the will contains a direction to pay the legacy at a certain time, interest runs from that time, or to pay it out of a reversionary fund, interest runs from

the time the fund falls into possession (*In re Gyles*, [1907] 1 I. R. 65; cf. *In re Yates* (1907), 96 L. T. 758).

#### PARAGRAPH (1).

In *In re Pearce*, [1909] 1 Ch. 819, the testator left certain large residences with their furniture, horses, carriages, etc., to a devisee. The executors while winding up the estate, incurred certain expenses through keeping a number of servants to preserve and care for these residences and chattels:—*Held*, that these must be paid not out of the residuary estate but by the devisee.

General and demonstrative legacies do not carry interest in the absence of express direction until the end of the executor's year, but then in the absence of express direction they do bear it, even when in the case of demonstrative legacies they are made payable out of a fund which has not at the end of the year vested in possession (*In re Walford, Kenyon v. Walford*, [1912] 1 Ch. 219).

#### PARAGRAPH (2).

A contingent residuary bequest carries intermediate interest or income unless this is expressly given to some other legatee since, in the absence of such a gift, the intermediate interest or income forms part of the residuary personality (*Re Adams*, [1893] 1 Ch. 329). A contingent devise does not for the same reason (*Lord Bechtive v. Hodgson* (1864), 12 W. R. 535). A contingent residuary gift of mixed realty and personality carries the intermediate income (*Re Burton, Banks v. Heaven*, [1892] 2 Ch. 38). See Under. and Stra. Inter. of Wills, p. 214.

#### PARAGRAPH (3).

(i) As regards a legacy expressly left for the maintenance of an infant, see *In re Churchill, Hiscock v. Lodder*, [1909] 2 Ch. 431.

(ii) As regards a contingent legacy by a parent to an infant but not expressly given for maintenance, see *In re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108. There the contingencies on which parts of the legacy were to become vested were the legatees attaining the ages of twenty-five and thirty. The court held that as these contingencies had nothing to do with infancy, the legacy did not carry interest from the testator's death.

(iii) See *supra*, Art. XCVII.

## CHAPTER V.

## THE LIABILITIES OF PERSONAL REPRESENTATIVES.

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**ART. CCXXI.—*Actions against Personal Representatives.***

(1) An action for the administration of the assets of a deceased person by the Chancery Division (as relief against executors or administrators) may be brought—

(i) By any creditor whose debt is actually due.

(ii) Where the deceased left a will by any legatee or devisee whose interest under the will is not merely expectant.

(iii) Where the deceased died wholly or partly intestate by any of his next of kin or heir-at-law.

(2) When such an action is brought the personal representatives may—

(i) Pay the debt or legacy (if specific or pecuniary) with costs, when the action will be dismissed.

- (ii) Admit assets, when judgment for the debt or legacy (if specific or pecuniary) will be given.
- (iii) Contest the plaintiff's right to judgment for administration, when the court will grant such judgment only if it appears such a course is desirable.
- (iv) Submit to a judgment for administration.

(3) Upon an application to the Chancery Division the court may—

- (i) Order that the application shall stand over for a certain time and that meanwhile the personal representatives shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings.
- (ii) When necessary to prevent proceedings by other creditors or by persons beneficially interested, make the usual judgment or order for administration with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

Formerly the administration of the estates of deceased persons lay within the jurisdiction of the Ecclesiastical Courts. The Court of Chancery early acquired concurrent jurisdiction which Lord HARDWICKE rendered practically exclusive by restraining proceedings before an Ecclesiastical Court where there were pending proceedings in Chancery. By the end of the eighteenth

century the jurisdiction of Ecclesiastical Courts as to administration had become obsolete, though it continued as to probate and letters of administration till the passing of the Court of Probate Act, 1857, which (sect. 3) abolished the jurisdiction as to these matters of "all ecclesiastical, royal peculiar, peculiar, manorial and other courts and persons in England," and vested it in the Court of Probate, now merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice (Judicature Act, 1873, sects. 3 and 16).

Under the jurisdiction of the Court of Chancery, the liability of personal representatives and the nature of the relief given against them (see note to paragraph (1)) have been closely approximated to those of trustees.

#### PARAGRAPH (1).

The procedure with regard to administration actions is regulated by Order 55 of the Rules of the Supreme Court. An administration action may be commenced either by writ or by originating summons (rules 3 and 4). When it is commenced by writ the decision is called a judgment, when by originating summons an order.

Under rule 3 the persons named in paragraph (1) and also the personal representatives can, without asking for general administration, apply to the court by originating summons for (a) the determination of any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir-at-law or cestui que trust, (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others, (c) the furnishing of any particular accounts by the executors or administrators, and the vouching (when necessary) of such accounts, (d) the payment into court of any money in the hands of the executors or administrators or trustees, (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators, or trustees, (f) the approval of any sale, purchase, compromise, or other transaction, (g) the determination of any question arising in the administration of the estate or trust.

All these matters are now usually decided without any administration order being made. It is nevertheless customary to ask in summonses under rule 3 for administration "as far as the same be necessary" in order to give the court a wider power to deal with the specific matters raised in the summons.

Since the Land Transfer Act, 1897, a creditor suing for administration of his deceased debtor's real estate need not sue on behalf of himself and all the other creditors (*In re James, James v. James*, [1911] 2 Ch. 348).

#### PARAGRAPH (2).

(i) and (ii) As to payment by personal representatives and dismissal of action, see *Re Greaves* (1881), 18 Ch. D. 551; *Manton v. Roe* (1844), 14 Sim. 353. As to judgment for the plaintiff for the amount of the legacy or debt when the personal representative admits he has assets to meet it, see Seton on "Judgments and Orders," chap. XLIV. sect. III.

(iii) Formerly there was no discretion in the court to refuse an order or judgment for administration (*per SELBORNE, L.C., Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; Stra. L. C., p. 11). Now by rule 10 of Order 55, R. S. C., it is not obligatory on the court to make such order or judgment if the questions between the parties can be properly determined without it.

#### PARAGRAPH (3).

Where the administration suit is due solely to the fact that the personal representatives or trustees wrongfully refused to produce proper accounts, the court may, at the hearing, direct that the costs of the application be borne by them personally (*Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289; Stra. Lead. Cas., p. 133).

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**ART. CCXXII.—*Liabilities similar to those of Trustees.***

(1) Generally the liabilities of executors who have taken probate and of administrators are those of other trustees, that is :

- (i) They are chargeable only with assets which they have actually received or which they might have received but for their own wilful default.
- (ii) Once they are chargeable with assets they can discharge themselves only by showing that they disposed of the same in regular course of administration, subject to this—
  - (a) that in an action against executors to recover a legacy they can after twelve years plead sect. 8 of the Real Property Limitation Act, 1874, although they have not disposed of the same in due course of administration;
  - (b) in an action of *devastavit* they can when six years have elapsed since the *devastavit*, plead sect. 3 of the Statute of Limitations, 1623.

(2) The rights to consult the court and to claim a discharge on completion of their duties given to trustees are given equally to personal representatives.

(3) The protection given to trustees in case of innocent breach of trust by way of—

- (i) limitation of action,
- (ii) indemnity, and
- (iii) excuse,

applies equally in the case of personal representatives.

#### PARAGRAPH (1).

It seems uncertain whether an executor who has acted in fact as executor, but who has not taken probate, can be held liable for assets lost through his wilful default. Thus in *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162, a testator died leaving as part of his effects a policy of insurance. This policy was pledged by him for more than its value. The debt bore interest at 5 per cent. The insurance company refused to pay the amount of the insurance until the testator's will was proved, and the executors delayed taking probate for seven years. During this time they never had sufficient assets to pay off the debt on the policy. When they took probate the insurance company paid the amount insured for, with interest at the rate of 1 per cent. per annum for the seven years. A residuary legatee attempted to make the executors liable for the difference between the 1 per cent. received, and the 5 per cent. paid :—*Held*, that they were not liable.

(i) Any improper dealing by which assets are lost to the deceased's creditors or beneficiaries is called a devastavit on the part of the personal representative. When he is proceeded against for devastavit and it is alleged that the devastavit arose through fraud or wilful default, the action should be brought by writ and the question should be decided before judgment. If the judgment is against the personal representative, a decree is made for

him to account on the footing of wilful default. On the other hand, if no such allegation is proved, the court orders merely a common account. But where a *devastavit* appears on the face of a common account it may be charged against him (*Re Sterens, Cooke v. Stevens, supra*, *per LINDLEY, L.J.*, at p. 172).

As to common accounts and accounts on the footing of wilful default, see *supra*, Art. CLXXXIV.

(ii) When a personal representative is sued for a debt or legacy which he admits but denies he has assets to meet, he pleads either *plene administravit* or *plene prater administrarit*. By the first is meant that he has entirely disposed of the assets in due course of administration; by the second that he has so disposed of them all, except a portion which he reserves against a liability having priority to the plaintiff.

It is to be remembered that besides the right to plead the Statutes of Limitations (as to which see Stra. Wills, pp. 100, 101), due course of administration is different in the case of a personal representative from what it is in the case of a trustee. A trustee has not the power to retain his own debt, to prefer one creditor's debt to another's, to pay a debt not bearing interest while leaving unpaid one bearing interest, etc. And executors, unlike trustees, need not necessarily act jointly.

#### PARAGRAPH (2).

As to the right of an executor to consult the court, see *Sharp v. Lush* (1879), 10 Ch. D. 468.

#### PARAGRAPH (3).

[See Arts. LXXI.—LXXXIII.]

Thus in *Re Kay, Mosley v. Kay*, [1897] 2 Ch. 518, the testator died in June, 1894. His assets amounted to £22,000, and his debts as then ascertained to about £100. By his will he left a legacy of £300 to be paid

at once to his widow and an annuity of £100. In August M. made an indefinite claim for rents which the testator had received as his agent and not accounted for. In November advertisements for creditors to send in their claims were issued. In December M. commenced an action against the executor claiming an account on the footing of wilful default on the part of the testator. The executor without obtaining the consent of the court defended the action, continuing meanwhile to pay the widow the £100 annuity. In April, 1896, judgment for £26,000 was given in the action against the executor : —*Held*, that s. 3 of the Judicial Trustees Act, 1896 (*supra*, Art. LXXIII.) applied ; that the payment of the £300 immediate legacy to the widow and of the £100 annuity till action brought was reasonable ; but that the payment of the annuity after action brought was unreasonable and a *devastavit* and should not be relieved against.

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